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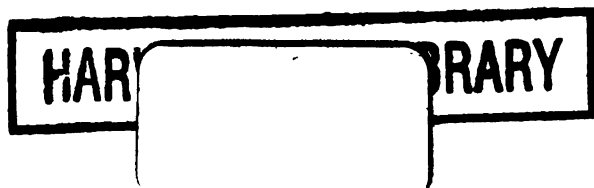
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1. The first part of the document is a list of names and dates, which appears to be a record of some kind. The names are written in a cursive script, and the dates are in a more formal, printed style. The list is organized into two columns, with names on the left and dates on the right. The names are: John Smith, James Brown, William Jones, Thomas White, and Robert Black. The dates are: 1790, 1791, 1792, 1793, and 1794. The list is followed by a section of text that is also written in cursive. This text appears to be a description of the events that took place during the period covered by the list. It mentions the names of the individuals listed and describes their actions and the circumstances surrounding them. The text is written in a clear, legible hand, and it is easy to follow the narrative. The document is a valuable historical record, and it provides a detailed account of the lives of the individuals listed. The list and the text are both well-preserved, and they are in good condition. The document is a good example of the type of records that were kept in the late 18th and early 19th centuries. It is a valuable resource for historians and researchers who are interested in the lives of the individuals listed. The document is a good example of the type of records that were kept in the late 18th and early 19th centuries. It is a valuable resource for historians and researchers who are interested in the lives of the individuals listed.

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Oct 9

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OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Tennessee,

DURING THE YEARS

1859-60.

BY JOHN W. HEAD,
STATE REPORTER.

VOLUME III.

NASHVILLE:

J. C. MERCER,.....PRINTER TO THE STATE.

1866.

Rec Oct 27. 1866

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**JUDGES OF THE SUPREME COURT
OF TENNESSEE.**

HON. ROBERT J. MCKINNEY, - - - - KNOXVILLE.
" ROBERT L. CARUTHERS, - - - - LEBANON.
" ARCHIBALD WRIGHT, - - - - MEMPHIS.

ATTORNEY GENERAL OF TENNESSEE,
JOHN W. HEAD,
GALLATIN.

The Hon. ROBERT L. CARUTHERS resigned his position on the Supreme Bench ; and the Hon. W. F. COOPER was elected in his place. No term of the Court was held after his election, until the war ended. On the termination of the war, His Excellency, W. G. BROWNLOW, appointed the following Judges of the Supreme Court :

HON. SAMUEL MILLIGAN,Greeneville.
" J. O. SHACKLEFORD,Clarksville.
" ALVIN HAWKINS,Huntingdon,

Most of this Volume was prepared during the excitement of the winter of 1861. The remainder has been prepared in the midst of professional engagements. This, I trust, will cause the errors it may contain, to be overlooked by the Profession. Mistakes in the publication of books are unavoidable ; and none but those who have tried the experiment, can appreciate the difficulties and labors incident thereto. It has been my aim, while in office, to accommodate and further the interest of the Lawyers, throughout the State. How far I have succeeded, is for them to determine. To them and to the distinguished members of the Court, I return my thanks for their kind indulgence and generous aid, in the discharge of my official duties.

REPORTER.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE: SEPTEMBER TERM, 1859.

HAYNES WALKER, Ex, R v. JOHN A. SKEENE *et al.*

1. **WILL. Evidence. Interest of witness.** It is a well settled rule of evidence, that a witness is competent who is called to testify against his interest, or where he is equally interested on both sides of the cause, so that his interest on one side, is counterbalanced by his interest on the other. This rule of evidence obtains in contests about wills, as in other civil suits.
2. **SAME. Same. Doubt as to interest.** The question of competency is, in all cases, a collateral one; and it is not proper to reject the witness, altogether, because of the difficulty of ascertaining his interest. A witness is presumed to be competent, and the *onus* of showing his incompetency is upon the objecting party. If he fails to establish his incompetency, or his interest is left in doubt, it is proper to permit the witness to be examined and let it go to his credit.
3. **SAME. Same. Question may be submitted to the jury.** The question as to the competency of a witness is, usually, to be determined by the Court; but, as it often depends upon the decision of intricate questions of fact, the Court may, in its discretion, take the opinion of the jury upon the facts.
4. **SAME. Same. Act of 1784. Witness not to be interested in the devise of the lands.** By the act of 1784, a witness to a will of real estate is competent to prove the due execution of said will, provided he is not interested in the devise of such lands, although such witness may be a legatee as to the personalty.

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5. *SAME. Same. Same. Witness must be competent when the will is attested.* Under the act of 1784, the witnesses to a will must be competent at the time of their attestation of such will; and if the will be once properly attested, no subsequent event can destroy its validity.
6. *SAME. Same. Same. Construction of.* The language used in the will, "provided they, the said John Walker and James E. Walker support their sister, Elizabeth Walker, so long as she remains single," in reference to the land there given them by the testator, creates in her no estate, or interest. Her support is, simply, a *personal charge* on said devisees. There is no charge upon the estate, and the competency of said witness is not affected by said provision.
7. *SAME. Question reserved.* If an attesting witness takes an interest in the devise of lands under the will, which is neutralized or overbalanced by a contrary interest of equal, or greater value in the estate, in case of an intestacy, or from other cause, is he competent under the act of 1784 to prove the will?

FROM JEFFERSON.

This cause was tried before WELCKER, J., and a jury. There was a verdict, and judgment against the will. To reverse said judgment, an appeal in error, was prosecuted. The facts are stated in the opinion of the Court.

J. P. SWAN, for the plaintiff.

R. MCFARLAND, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This case involves the question of the validity of the last will and testament of John Walker, deceased, and was tried in the Circuit Court of Jefferson county, upon an issue of *deviseavit vel non*, which was found by the jury against the will, and judgment rendered accordingly; to reverse which this writ of error is prosecuted.

This will is attested, only, by two subscribing witnesses, namely, Daniel Carter and Elizabeth Walker—the latter a

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child of the testator, and in the event of *intestacy*, an heir at law and distributee in his estate.

He died seized and possessed of both real and personal property, and the will embraces both; and *under it*, the witness, Elizabeth Walker, is entitled to various legacies of personal estate, but takes no interest, whatever, in the lands of the testator. He left nine children, or their legal representatives; and since the death of the testator, the said Elizabeth Walker has intermarried with Wm. Cluck.

Upon the trial in the Circuit Court, after the will had been duly proved by Daniel Carter, one of the attesting witnesses, the plaintiff offered to prove said will by the said Elizabeth, now Elizabeth Cluck—the other subscribing witness—but the defendants objected to the proof of said will by the said Elizabeth, on the ground that she was totally incompetent; whereupon, the plaintiff offered to prove by others, and, also, by the witnesses to said will, that her interest would be much greater without the will, as an *heir* of the testator, John Walker, than if said will were established; but the Court refused to hear this testimony, and held that she was an incompetent witness to prove the execution of the will.

In this there is error. Tested by the rules of the common law, there can be no doubt as to this question. No principle is better settled than that where a witness is produced to testify *against his interest*, or where he is *equally interested on both sides of the cause*, so that his interest on one side is counterbalanced by his interest on the other, the rule that interest disqualifies does not apply, and the witness is competent. 1 Greenl. Ev., secs. 391, 399, 410, 420.

It has been repeatedly held that a witness, whose interest under the will is balanced by his interest in the estate in case of an intestacy, is competent either to support or invalidate it; or where, from any other cause, his interest under the instrument is neutralized by an opposing interest against it. *Garland v. Crow's Ex'rs*, 2 Bail. 24; *Allen v. Allen*, 2 Tenn. 172; 4 Des., 282; *Thompson v. Sherman*, 1 Bibb, 401; *Bacon v. Bacon*, 17 Pick., 134.

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If this be the rule in the case of a balanced interest, why is it not, *a fortiori*, the rule, where the witness comes to testify against his interest? *Allen v. Allen*, was a case where the witnesses were held competent, and, as we understand it, if they had testified, it would have been *against their interest*.

But it is contended by the counsel of the defendants in error, that these principles can have no application here, because to ascertain where the interest of the witness lies would involve a collateral inquiry wholly impracticable, unless the Court were to take an inventory of the estate, its debts, &c. We do not assent to this argument. Is not the question of competency in all cases a collateral question? And will it do to reject the witness altogether because of the difficulty of getting at his interest? If it be of a doubtful nature, the objection goes to his credit, and not to his competency. He is always presumed to be competent, and it lies upon the objecting party to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn. 1 Greenl. Ev., sec. 390. It is usually a question for the Court, and often depends upon the decision of intricate questions of fact, and the Judge may, in his discretion, take the opinion of the jury upon them. 1 Greenl. Ev., secs. 422 to 425. But we know of no authority for the rejection of the witness altogether, because of the difficulty of arriving at his interest; and apprehend that the rules of evidence upon this subject, in testamentary causes, must be the same as in other civil suits. Moreover, we venture the remark, that as to most estates, the question will be easily decided. It must have presented itself in the cases of balanced and neutralized interests to which we have referred.

The next question is, whether Elizabeth Walker was competent to attest the paper as one of the two witnesses required by law to a will of real estate, under the act of 1784, ch. 22, sec. 11? The will, by this act, is to "be subscribed in the testator's presence, by two witnesses at least, no one of which shall be interested in the devise of the said lands." We are here to be governed by the common law, save where it is changed

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by this act. And we must bear in mind that a statute is not to be held to alter the common law farther, or otherwise than the act expressly declares. 7 Bac. Ab. (Title Statute I—4.)

It is well settled in North Carolina that the witnesses should possess the character required by the act, at the time of their attestation; and if the will be once properly attested, no subsequent events can destroy its validity. *Allison v. Allison*, 4 Hawks, 141; *Tucker v. Tucker*, 5 Ird., 161. And so is the rule in *Allen v. Allen*, 2 Tenn., 172, and the weight of authority elsewhere. *Modern Probate of Wills*, 475, 487—8—9.

Here then are the two subscribing witnesses, and *neither of them is interested in the devise of any of the lands in the will*. The act does not say that no will shall be good to pass any estate in lands, unless it be subscribed by two witnesses, neither of which shall be interested in *any gift in the same contained*. No such thing: And nothing of the kind was intended. That was left as at common law. The fact that Elizabeth Walker, in the case of an *intestacy* of her father, might be one of his heirs and distributees, did not destroy her qualification, under the act, as a witness to his will. This is decided in *Allen v. Allen*, 2 Tenn., 172. Neither did the fact that she had legacies of personal estate under the same will. This position is embraced by the reasoning in the same authority. The question came directly up in *Winant's Heirs v. Winant's Devisees*, 1 Mur., 148. The case, as reported, is as follows:

“The testatrix, Penelope Winant, duly published her last will and testament in writing, in the presence of James Word and Margaret Houghton, the only subscribing witnesses thereto, in which was contained the following clause, to wit: ‘I give and bequeath unto Margaret Houghton one woollen wheel, one white round table, all my chairs, and six months to live in the house, if she chooses.’ Margaret Houghton was one of the subscribing witnesses to the will, and the question referred to this Court was, whether the said Margaret was competent to prove the will as to the real estate?

“By the Court: The devise to the witness, Margaret

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Houghton, of permission to stay six months in the house if she chooses, conveys to her no title either to the house or land; and the will being sufficiently proved as to the personal estate by the other witness, there appears to be no such interest in Margaret Houghton as to destroy her competency as a witness to prove the will for the lands."

To the same effect is the doctrine of *Tucker v. Tucker*, 5 Ird., 161. And the position is fortified by *Allison v. Allison*, 4 Hawks., 141; *Daniel v. Proctor*, 1 Dev., 428; *Old v. Old*, 4 Dev., 500; and *Matthews v. Marchant*, 3 Dev. and Batt., 40.

We are to remember, too, that where a will disposes of both real and personal estate, so far as the attestation of the subscribing witnesses is concerned, it may be good as to the one species of property, and not as to the other. *Tucker v. Tucker*, 5 Ird., 161.

We have said that Elizabeth Walker was not *interested in the devise of any of the lands in this will*, for the words: "Provided they, the said John Walker and James E. Walker, support their sister Elizabeth Walker so long as she remains single." used in the 4th clause of the will, in reference to the land there given them by the testator, create in her no estate, or interest. Her support is, simply, a *personal charge* on the devisees, John and James E. Walker, in respect of the estate in their hands. They take the estate on condition of paying the charge, and if they had died in the lifetime of the testator, the charge would have ceased; and if they refuse to accept and perform, the devise is void, and the heir may enter. There is no charge upon the *estate*. *Jackson v. Bull*, 10 Johns. R., 149; *Jackson v. Martin*, 18 Johns. R., 32, 37.

We have been referred to the case of *Gass' Heirs v. Gass' Ex'rs*, 8 Hum., 278, as an authority in support of the judgment of the Circuit Court. But it is manifest that case can have no application here. David Gass, the witness there, was neither an heir or distributee in the supposed testator's estate, and did not come to testify *against his interest*, or in the case of a balanced interest. He was a legatee under the will, and an attesting witness to the codicil, and in effect, was ex-

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amined in *support of both, against the heirs at law and distributees* ; and was, therefore, an interested witness, and inadmissible upon common law principles, unless that interest were, in some proper way, removed ; which was not done, or attempted. No question was made upon the act of 1784, and none could have been made ; for the witness was *not interested in the devise of the lands*, the gift to him being merely a legacy of *personal estate*.

It is not intended, and we do not decide, as to the qualification of a witness under the act of 1784, to attest a will, where he takes an *interest in the devise of the lands* under it, which is neutralized or over-balanced by a contrary interest of equal or greater value in the estate in case of an intestacy, or from other cause. At common law, in such a case, we have seen the witness would be competent. But it may not be so under the act of 1784 ; and as it is not necessary here, we do not dispose of the question. *Allen v. Allen*, 2 Tenn., 173-4.

We are, therefore, of opinion, that Elizabeth Walker was a competent witness to this will under the act of 1784 ; and that upon proving the facts proposed to be established, but which were rejected by the Circuit Court, she may very well testify as a witness to the will.

The judgment of the Circuit Court will be reversed, and the cause remanded for another trial.

M. T. C. Royston *et al.* v. Jas. D. Wear *et al.*

M. T. C. ROYSTON *et al.* v. JAS. D. WEAR *et al.*

1. **ESTOPPEL.** *When common source of title. Privies in estate estopped.* If parties derive title to real estate from a common source, they are *estopped* from denying the *seizure* and *title* of the original claimant from whom they derive title. When parties, if living, would thus be *estopped*, their *heirs* and *privies* in estate, are likewise *estopped*.
2. **SAME.** *Same. Deraignment of title not required.* In an action of ejectment, if the defendant is thus *estopped* from denying title, the plaintiff is not required to deraign his title any farther than to the common source.
3. **STATUTE OF LIMITATIONS.** *Disability.* If the husband acquires land in right of his wife, and conveys the same by deed, and delivers the possession thereof—the wife not uniting in said conveyance—there being issue of the marriage at the date of the deed; and the husband survive the wife, the statute of limitations does not begin to run against the heirs of the wife, until the death of the husband.
4. **DEMURRER.** *Declaration. Statement of plaintiff's interest in the land. Act of 1852, ch. 152.* The omission to state in the declaration the extent of the plaintiff's claim, whether the whole, or an undivided interest in the land, is not fatal on demurrer. After judgment, any defects, or imperfections in matters of form, may be amended by the Court in which the judgment is rendered, or the Court to which it shall be removed by writ of error, or appeal, if substantial justice require it; and if the amendment be in affirmance of the judgment.

FROM GREENE.

This cause was tried at the June Term, 1859, of the Circuit Court, PATTERSON, J., presiding. Verdict and judgment for the plaintiffs. The defendants appealed.

NELSON, and T. D. & R. ARNOLD, for the plaintiffs in error.

MILLIGAN, MAXWELL and DEADRICK, for the defendants in error.

WRIGHT, J., delivered the opinion of the Court.

M. T. C. Royston *et al.* v. Jas. D. Wear *et al.*

This is an action of ejectment, in which the plaintiffs below insist they have shown a title in themselves to the land in dispute in two modes: First, by a regular chain of conveyances from the State; and next, by placing the defendants in such an attitude, in relation to this land, toward themselves, as that they are estopped to deny their title.

The facts upon the question of estoppel are these: Adam Dunwoody, at a very early day, resided upon the land for several years, and died, leaving four children, to wit: William, James, Margaret and Esther. Previous to his death he made a will, dated the 11th of June, 1794, in which he devised this land to his son William. William died intestate, unmarried and without issue, and the land descended to his sisters Margaret and Esther, and to his brother James, as his heirs at law. Esther married John Bonham; and Margaret, on the 19th of December, 1810, married Hugh Wear. On the 12th of October, 1816, the said Bonham, Hugh Wear and James Dunwoody, for the consideration of \$1140.00, conveyed this land, by deed in *fee simple*, with covenants of general warranty, to Joshua Royston, who, about that time, entered into possession of the land, claiming it as his own, and continued so to hold and claim it till his death; and the defendants below, the tenants in possession, who are his heirs at law, have so held and claimed ever since. This deed was duly proved at the July sessions, 1817, of the County Court of Greene county, and registered in that county on the 13th of October of the same year. In it the said Bonham, Hugh Wear and James Dunwoody, are described as the heirs of William Dunwoody, deceased, and legatees of Adam Dunwoody, deceased. Margaret, the wife of Hugh Wear, and Esther, the wife of Bonham, did not unite in said deed, and were not parties to it. The said Margaret died the 29th of March, 1825, and the said Hugh Wear, in September, 1856. The plaintiffs are the children of Hugh and Margaret Wear, and commenced this action of ejectment on the 3d of March, 1858, for the recovery of the one undivided third part of the

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said tract of land, as the heirs at law of their mother, the said Margaret.

So far as it may be material to this controversy, we are warranted in assuming, not only from the facts, but because the jury have so found, under proper instructions from the Court, that Hugh and Margaret Wear had issue of their marriage prior to the execution of the deed to Joshua Royston.

It is true, there may be no very direct evidence that Joshua Royston held under this deed; but still the proof that he did so is very strong, and we are satisfied he did. It is not attempted to show, or pretended that he held under any other title. In addition to the fact that he took possession of this land about the date of the deed, he is proved to have stated that he had bought and lived on the land that Adam Dunwoody died on. The jury, under proper instructions from the Court, have also found this matter in favor of the plaintiffs, and, we think, were well warranted in so doing. Indeed any other conclusion would be unreasonable.

Upon these facts, we think the defendants below were estopped to deny the seizin of William Dunwoody, he being the common source of title to all the parties; and that the Circuit Judge was correct in so holding. How would the case be between John Bonham, Hugh Wear and James Dunwoody upon the one side, and Esther and Margaret, the wives of the said John and Hugh, upon the other? Could the former controvert the title of the latter? Certainly not. The said Margaret, Esther and James had entered into this estate claiming under William Dunwoody, as his heirs, and were tenants in common; and the said John and Hugh held interests as husbands in right of their wives. Joshua Royston and his heirs are in no better situation than John Bonham, Hugh Wear and James Dunwoody. The said Joshua is a purchaser of the title and privy in estate only, and he and his heirs are estopped also, by reason of the estoppel of the said John, Hugh and James, under whom they claim; and the plaintiffs, as the heirs of said Margaret, are entitled to the benefit of this estoppel. *Perry v. Calhoun*, 8 Hum., 551; *Rochell v.*

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Benson, Hunt & Co.'s Lessee, Meigs' Rep., 3, 7; 2 Greenl. Ev., sec. 308; *Smith v. Burtis & Woodward*, 9 Johns., 175; *Jackson, ex dem. Hill v. Struler*, 5 Cowan, 530.

This being so, it is unnecessary to inquire whether the plaintiffs have made out, also, a regular paper title, or to go into the consideration of the various objections made to the reading of the grants and deeds in deraigning title to Adam Dunwoody, being satisfied, as we are, that the copy of the deed from John Bonham, Hugh Wear and James Dunwoody, to Joshua Royston, was properly admitted; and being further satisfied, that the case was submitted to the jury by the Circuit Judge, upon the force of said deed and of the estoppel, and was so considered by them; and that the reading of the grants and other deeds could not, possibly, have prejudiced the defendants.

We may remark, however, that in our examination of the case, we see very little reason to call in question the admissibility of any of said papers, unless it be the copy of a single deed.

It is equally plain, that the plaintiffs were not precluded from a recovery, either by the statute of limitations or lapse of time; and that the Circuit Judge did not *err* in his instructions to the jury upon this subject. As decisive of this question, we need only refer to the cases of *McCorry v. King's heirs*, 3 Hum., 267; and *Miller v. Miller*, Meigs' Rep., 484; see also, *Guion v. Anderson*, 8 Hum., 298; and 11 Howard U. S. Rep., 350.

The declaration was demurred to, and the demurrer overruled by the Circuit Court. It is insisted, that in this there was error, for which the judgment should be reversed.

The ground of the demurrer was, that the plaintiffs claimed an undivided share or interest in this land; but, in the declaration, failed to state the extent of that interest, whether a third or fourth, or any other particular share. It is true, the act of 1852, ch. 152, sec. 4, requires this to be done. But, by the same act, the jury in their verdict, are required to specify such share or interest, and to describe the same

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with convenient certainty. This is done in the verdict in this case, and the objection has now become one of mere form. By the fourth and fifth sections of the same act, all writs of error for matters of form are abolished; and any defects or imperfections in matters of form found in the record after judgment rendered, may be rectified and amended by the Court in which the judgment is rendered, or the Court to which it shall be removed by writ of error or appeal, if substantial justice require it, and if the amendment be in affirmance of the judgment.

This cures the difficulty, and the objection falls to the ground.

Upon the whole we see no error in this record, and affirm the judgment.

WILLIAM J. BIRD v. G. B. K. FANNON .

1. **FORCIBLE ENTRY AND DETAINER.** *When it lies.* If a party take possession of the land of another, as a sub-tenant, he would occupy the place of the tenant, and be liable to this action. So, if he entered as a trespasser the action would lie; but if he entered peaceably and for himself, without any connection with the owner or tenant, the premises being vacant, he could not be turned out of possession by this action.
2. **SAME.** *Evidence. Bill of exceptions. New trial.* The manner in which the defendant obtains the possession of land being the *gist* of this action, there must be some evidence, upon this material question, in the bill of exceptions, or the Supreme Court will grant a new trial. Such evidence cannot be presumed, when the bill of exceptions states that all the evidence in the cause is set out therein.

FROM GREENE.

This cause was heard at the June Term, 1859, of the Circuit Court, Judge PATTERSON presiding. The jury re-

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turned a verdict in favor of the plaintiff. The defendant appealed.

R. ARNOLD, for the plaintiff in error.

MAXWELL & MILLIGAN, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This is an appeal in error from an action of *unlawful detainer*, successfully prosecuted in the Circuit Court of Greene. The case is most imperfectly made out on both sides. The bill of exceptions cannot contain all the evidence. There are not facts enough given to enable any one to form an opinion as to the proper disposition of the case. The charge of the Court assumes a state of facts that is not to be found in the record, and lays down principles that have no connection with the case made out. We think it probable that the evidence authorized the charge, and that it has been neglected to make the bill of exceptions show it. The assumptions of the charge misled us as to the character of the proof set out in the record. But we cannot know anything out of the record, although we may suppose that it is imperfect.

In this case the law is correctly charged upon the case assumed; but upon a careful inspection of the evidence, as we have it, we find that it falls short upon some material points of making out the case, which, from the charge, it would be supposed existed.

We thought at first, that under the strong rules in favor of the conclusive character of the action of a jury, without error on the part of the Court, that the judgment in this case should be affirmed. But the absence of *any proof at all*, on one material point, upon a closer inspection of the record, has changed our opinion. There is no proof or circumstance to show how Bird came into the possession, or in any way to connect him with Eddleman. It is impossible for us to see how he became liable to this peculiar action, as the bill of ex-

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ceptions is entirely silent as to the character of his holding, or in what mode or under what circumstances he obtained the possession. If Eddleman was a tenant of Fannon when he died in 1857, either by contract or implication, and Bird entered under a contract of purchase from him, or otherwise, under him or his claim, he would occupy his shoes, and be liable in this action to the landlord.

The case imperfectly shadowed forth in the bill of exceptions is this: That Fannon and Eddleman were joint owners of the tract of land in question, and that they agreed upon and ran a partition line between them, and Eddleman was to live upon the part which was assigned to Fannon, being the same which he had previously occupied, during his life, or at the discretion of Fannon, upon conditions perhaps, and that he died in possession in 1857, about five years after this agreement; whereupon Bird entered into the possession, and still holds it. But whether he entered under a contract with Eddleman, or under a claim of right, or as a trespasser, does not in any way appear. On that point the proof is entirely silent. If he entered in any way under Eddleman, the Court correctly held he would stand in his shoes, and be subject to this action upon the assumption that Eddleman was the tenant of Fannon. Or, if it appeared that the latter was entitled to the possession, and that Bird held or entered unlawfully, this action would lie for the possession. But if the possession was vacant, and Bird entered peaceably, and for himself, without any connection with Eddleman, according to the case of *Greer v. Wroe & Wife*, in 1 Sneed, 247, he would only be subject to an action of ejectment to try the title, and not to an action of forcible and unlawful entry and detainer.

The law of the charge is correct, but the facts, as they are presented to us in the record, do not make out the case that seems to be assumed. There is no proof at all to connect Bird with Eddleman, nor that the place was in the possession of any one when the former entered. We think it more than likely, from the apparent assumptions of the Court, that there was such proof as would sustain the verdict, but it is not set

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forth, and we cannot act upon the presumption of its existence, as the bill of exceptions states that all the evidence is set out. There must be *some* evidence to make out the state of the case on which the verdict must rest.

This summary action, given for the recovery of possession, is very proper and salutary in the cases prescribed by the statute; but we must not go beyond what is written in the use of it. We decide nothing now, but that the evidence, as we see it, does not make out a case for this statutory remedy.

Judgment reversed, and new trial granted.

JAMES A. ROSS v. F. A. RAMSEY *et al.*

1. **SALE OF LAND. Partition.** A sale of land for *partition*, is a matter of right, provided it shall appear to the Court that it cannot be equally divided among those entitled thereto, or that it would be manifestly for their *interest* that it should be sold.
2. **SAME. Same. Pleading. Practice.** In order to authorize a sale for *partition*, the bill must be framed with that view, and contain the proper averments. The case must, also, be made out by proof.
3. **SAME. Disclaimer. Order pro confesso.** If a bill is filed to divest title to land belonging to minors and adults, as tenants in common, and the adults enter a *disclaimer* in favor of the complainant, a decree divesting their title is proper, as they are *sui juris*, and bound by such *disclaimer*; but if one of the adults fails to defend, and an order *pro confesso* is entered against him—the bill showing upon its face that the complainant is not entitled to the relief he asks—a decree, founded alone upon such order, cannot be made divesting the title of such adult.

FROM KNOX.

The lot mentioned in the pleadings belonged to Mrs. Margaret Ramsey. On the 8th day of March, 1841, she made a

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will, in which she *devised* the tract of land to F. A. Ramsey. In 1847, the said Margaret Ramsey *tore* her name, and the names of the witnesses, from the will. After her death the instrument was found in that condition. The bill alleges that the names were not torn off with the intention of destroying the effect of said paper writing, as a devise of the lands mentioned therein. No effort was ever made to prove said paper as a will. In November, 1855, F. A. Ramsey sold and conveyed the lot to the complainant for the consideration of \$4,000. The defendants are the heirs-at-law of Margaret Ramsey, some of whom are *minors*. The bill prays for a *divestiture* of the title to said lot out of the defendants; and that such a decree be pronounced in the cause as will perfect the complainant's title. The Court pronounced a decree, Chancellor LUCKY presiding, ordering a sale of the lot for *partition*. The complainant appealed.

MAYNARD and WASHBURN, for the complainant.

COCKE and RAMSEY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The decree in this case is erroneous. The object of the bill is to divest the title of the lot in dispute out of the defendants, and to vest the same in complainant. It can be viewed in no other light. It is plain from the bill and the entire case that Margaret Ramsey died *intestate*, and that this lot descended to all her heirs, as tenants in common, and that her son, F. A. Ramsey, acquired no exclusive title, as her devisee, the will under which he claims having been cancelled by his mother in her lifetime.

Complainant, as purchaser of F. A. Ramsey, has title to the shares of James H. Cowan, Thos. W. Humes, Mary White, and Margaret White, they having disclaimed title in his favor and being *sui juris*. He has also F. A. Ramsey's share by purchase. To this extent a decree to divest title would have been proper.

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But as to the *infant* heirs of Elizabeth White and Andrew R. Humes, and also as to Cornelia, the wife of Charles M. McGee, Margaret, the wife of John C. Greenway, and John N. Humes, complainant has no title. They all answer and insist upon their rights except John N. Humes, as to whom there is a *pro confesso*. And as the bill shows complainant has no title as to him, the *pro confesso* can avail nothing.

The only decree then proper in the case was a divestiture of title to the extent above stated. But this the Chancellor did not do; but proceeded to take proof and decree a sale for the purpose of partition, when the bill was not framed with any such view, and asked no such thing.

In the other aspect of the case, namely, a bill to sell the lot because it may be so situated that partition thereof cannot be made, or because it would be manifestly for the advantage of the parties, that it should be sold instead of partitioned, the bill makes no case. Without such a bill, with proper averments and proof, the decree cannot be sustained. What these are will be found under the head of partition, in the Code, articles five and seven, and need not here be enumerated.

A sale for partition is a matter of right, provided it shall appear to the Court that the property cannot be equally divided among those entitled thereto, or that it would be manifestly for their interest that it should be sold. *Helm et al. v. Franklin et al*, 5 Hum., 404. And it is more than probable, in this case, that proper grounds for a sale do exist; but they can only be made available by a bill framed with that view, with regular proceedings under it.

The decree of the Chancellor will be reversed, and the cause remanded to the Chancery Court at Knoxville, to the end that complainant, if he desires to do so, may amend his bill, and that the proper steps be taken and decrees had in conformity to this opinion.

Stewart Pemberton *et al.* v. Henry Smith.

STEWART PEMBERTON *et al.* v. HENRY SMITH.

1. **TROVER.** *General issue. Evidence.* In *trover*, all matters of defence may be given in evidence under the general issue of not guilty, except a release and the statute of limitations. A plea of justification is not necessary, therefore, on the part of an officer selling property under an execution.
2. **SAME.** *Same. Same. Fraud. Production of judgment and execution.* A fraudulent transfer of property is valid between the parties, and can only be impeached by judgment creditors. It is, therefore, necessary, when an officer is sued for property thus held, to produce the judgment and execution, to show that the relation of debtor and creditor existed; and also to show his authority for seizing the property, before he can be heard to allege fraud in its transfer.

FROM SCOTT.

This cause was tried before Judge GARDENHIRE, upon a plea of not guilty and issue. The property claimed by the plaintiff, was levied on as the property of John Smith. The defence relied on was, that it was fraudulently held by the plaintiff. The defendants below did not produce on the trial the judgment and execution under which the officer acted. The jury returned a verdict for \$65; and the motion for a new trial having been overruled, the defendants appealed.

HUMES, MYNOTT and SCOTT, for the plaintiffs in error.

YOUNG, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of *trover* against an officer for the wrongful seizure and sale of a *mule*, in the possession of the defendant in error. Judgment for the plaintiff, and an appeal in error.

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The ground of defence is, that the mule was the property of John Smith, son of the plaintiff, and had been fraudulently transferred to the plaintiff to defraud the creditors of the son. The execution and judgment against John Smith, by virtue of which the mule was seized, were not produced on the trial.

In *trover*, all matters of defence may be given in evidence under the general issue of not guilty, except, perhaps, a release and the statute of limitations. A plea of justification was not necessary, therefore, on the part of the officer; though in *trespass* it would have been otherwise, under our former system of pleading. But, still, the production of the judgment and execution, as evidence on the trial, was as necessary in the one form of action as in the other, and for the same reason; namely, that as the transfer of the mule was valid, as between the parties, and could only be impeached by creditors of John Smith, it was requisite to produce the judgment and execution, to show that the relation of debtor and creditor existed between the latter and the plaintiff in the judgment; and also to show the officer's authority for seizing the property.

But, though the verdict was proper upon the facts before the jury, we think, under all the circumstances, a new trial should have been given, upon terms, for the reason disclosed in the affidavit of defendants, in connexion with other matters in the record.

The judgment will be reversed, and a new trial awarded, on payment by defendants of all the costs from the return term of the summons.

H. K. Riley *et al.* v. Wm. E. Byrd *et al.*

H. K. RILEY *et al.* v. WM. E. BYRD *et al.*

1. DESCENT. *Brothers and sisters of bastard, inherit. Act of 1819, ch. 18.* By the act of 1819, ch. 18, the brothers and sisters of an illegitimate child dying intestate, without a child or children, inherit the estate of such illegitimate child.
2. SAME. *Same. Common law rule.* By the common law, illegitimates could neither take nor transmit by descent, except to their own offspring. They were destitute of inheritable blood. The act of 1819 changes the rule of the common law.
3. SAME. *Case in judgment.* F. died in 1847, intestate, leaving a widow, who also died. He left no children, nor the issue of such; but he left brothers and sisters and their issue. Held, that his brothers and sisters, and their issue, inherit his estate.

FROM HANCOCK.

This cause was tried before PATTERSON, Judge, who was of the opinion that the brothers and sisters of a bastard dying intestate, without children, did not inherit his estate. The plaintiffs appealed. The facts are stated in the opinion of the Court.

M. T. HAYNES, HEISKELL & NETHERLAND, for the plaintiffs.

L. C. HAYNES, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

In this action of ejectment a single question of law arises, and that is, whether the legitimate half-brothers and sisters inherit the land of an illegitimate who dies without children?

The case is this: Francis Fugate, jr., died in 1847 or '48, in Hancock county, leaving a widow, who is now dead, but no children, and was the owner of the tract of land in contro-

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versy. The widow sold the land to the defendants, and put them in possession; and that is their title. The plaintiffs claim, as the half-brothers and sisters, or their descendants, of the deceased, under the law of descents, of this State. The defence to the action is, that Francis Fugate, jr., was base-born, having been the son of the wife of Francis Fugate, sr., begotten and born out of wedlock. It may be taken as settled by the finding of the jury in this case, that this fact is established, and also that the plaintiffs are the children of the same mother, born in wedlock, by the said Francis Fugate, sr., her first husband, and Mahon, her second husband. But we do not inquire into the sufficiency of the proof on those points, nor pass any judgment upon it, as the only material question, now, is that suggested above. Was the Circuit Judge right in holding that legitimate brothers and sisters could not inherit from an illegitimate? This depends upon the construction of the act of 1819, ch. 13, (Car. and Nich., 250,) as that is the act which was in force, and must fix the rights of the parties, at the death of Francis Fugate, jr., in 1847. No reference need be made to the act of 1851, ch. 38, or the provisions of the Code, as they, being subsequent to the death of Fugate, can have no effect upon the rights of these parties.

Before that statute, the common law on that subject was in force in this State. By that law illegitimates could neither *take nor transmit* by descent, except to their own offspring, for they had no other heirs, and were destitute of inheritable blood. 4 Kent, 413. The austerity of this rule has been mitigated in most of the States and civilized nations, in favor of the mother and her natural children, so far as related to her property. By the act of 1819, *where there was no lawful issue*, illegitimate children were allowed to take the property of the mother, both real and personal, "by the general rules of descent and distribution." It then provides—and that is the clause now under consideration—that "*should either of such children die intestate, without child, his or her brothers and sisters shall in like manner take his or her estate.*" The Circuit Judge, in his construction, confined this change

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of the common law to *illegitimate brothers and sisters*, to the exclusion of legitimates. That is, that the statute made the brothers and sisters of a bastard his heirs, if they were also bastards, but continued the common law exclusion of them if they were legitimate. This is a discrimination against the general policy of the law, by which lawful children or kindred are preferred to those that are base-born. It is difficult to suppose that such was the intention of the Legislature. On what reason could it be founded, if such was the intention, it is not easy to conceive. It should require language too plain for construction to authorize or justify the conclusion that the Legislature intended to communicate inheritable blood to a bastard in favor of brothers born out of wedlock like himself, and not to those equally near to him in blood who happened to be more fortunate by being lawfully begotten. We would not presume without the use of phraseology entirely unequivocal that such an absurdity was intended.

The provision is, that when a bastard having property dies intestate and without children, "*his brothers and sisters shall take his estate.*" What authority have we to limit this to any particular description of brothers, or to inquire whether they are the illegitimate or lawful offspring of the same mother? If this could be done at all, it would seem most proper in favor of good morals and public policy to discriminate the other way. But we must take the terms used to have their ordinary meaning, and embrace all brothers and sisters, without regard to their legitimacy.

For this error then, in the charge of his Honor, on a question lying at the foundation of the case, we must reverse the judgment, and order a new trial.

Joseph Spurgin v. Samuel Spurgin.

JOSEPH SPURGIN v. SAMUEL SPURGIN.

1. **WRIT OF ERROR.** *Motion to dismiss. Section 3183 of the Code.*
Construction of. A writ of error is regarded in law as a new suit, and like all other suits, may be commenced by the party at his own peril without notice to the adverse party. Hence, it is not necessary to give the five days' notice required by section 3183 of the Code before applying for the writ. But, as in all other suits, the opposite party must have a day in Court to make his defence; and he must have notice of the pendency of the suit in the Supreme Court, at least five days before it is heard.
2. **SAME.** *Mode of obtaining the writ.* There are several modes of obtaining a writ of error: By simply filing a transcript of the record with the Clerk of the Supreme Court and giving bond; or by application to the Court in term time; or to one of the Judges in vacation.
3. **SAME.** *Time within which it must be applied for.* A writ of error must be obtained from the Clerk within one year after the judgment or decree, sought to be reversed, is rendered.

FROM SULLIVAN.

On the 23d of March, 1859, the plaintiff in error filed a transcript of the record with the Clerk of the Supreme Court, and demanded a writ of error. The Clerk granted the writ, and issued a notice to the defendant in error, of the application. The judgment was rendered on the 26th of March, 1858. At the present term of the Court, the defendant in error entered a motion to dismiss the writ, upon the ground that he should have been notified of the application for the writ, at least five days before it was made.

HEISKELL and LOGAN, for the plaintiff.

M. T. HAYNES, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

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This is a writ of error issued by the Clerk of this Court in vacation, upon the transcript of the record being filed in his office, and bond given as required by law, pursuant to section 3177 of the Code. A motion has been entered by the defendant in error, to dismiss the writ of error, on the ground of the plaintiff's non-compliance with the provision of section 3183, requiring that "five days' notice in writing shall be given to the adverse party of the intention to apply for the writ."

The argument in support of the motion assumes, that this notice is a necessary preliminary step, precedent to the application for a writ of error, in all cases; and, consequently, that the writ cannot be regularly issued until after the expiration of five days from service of such notice. In our judgment, this is not the proper construction of the law. However plausible it may seem, upon a literal reading of the section, it would lead to consequences so incongruous and absurd, that it is not to be supposed that such was the intention of the Legislature.

This provision of the Code, and indeed all its provisions in regard to the mode of prosecuting writs of error to the Supreme Court, are, in substance, but a re-enactment of the provisions of the law as they previously existed. Various methods are prescribed for obtaining a writ of error. It may be obtained, as in the present case, from the Clerk of the Supreme Court, within one year after the judgment or decree, sought to be reversed, by simply filing a transcript of the record in his office in vacation, and giving bond as required by law. See section 3177, which substantially incorporates the provisions of the act of 1811, ch. 72, sec. 12. Or, the writ may be granted by order of the Supreme Court, in term time; or, by any one of the Judges of said Court, in vacation.

Whichever of these modes may be pursued, there can be no question that notice to the adverse party is made alike necessary; this is conceded. The point to be determined is, whether the notice must necessarily *precede* the application for the writ of error; or, may not be given *after* it has been applied for and obtained. We are led to the conclusion that

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the latter is the correct construction, in view of the obvious reason and object of this requirement of the statute, which, in general, must control the literal import of words.

The object could not have been, to entitle the adverse party to appear and resist the issuance of the writ. The prosecution of a simple writ of error, is as much a matter of right as is the prosecution of an appeal. Under our system, the right to pursue either remedy, at the party's own peril, cannot be questioned or gainsaid. There would have been no sense, therefore, in providing that the adverse party should have an opportunity of appearing before the clerk when the writ was applied for, the latter having no discretion to judge of the propriety of the application, or to refuse it. And this may, perhaps, be said also in respect to an application for a writ of error merely, made to a single Judge of the Supreme Court.

Where, in addition to a writ of error, a *supersedeas* is likewise desired, there would be more reason in allowing the adverse party an opportunity of appearing before the Judge to whom the application is made, to show cause against the issuance of a *supersedeas*. Yet it cannot be supposed that it was contemplated by the Legislature, that the merits of the case should be discussed and adjudged by a single Judge, at Chambers, upon an application for a *supersedeas*.

A writ of error is regarded, in law, as a new suit. And like all other suits, may be commenced by the party, at his own peril, without notice to the adverse party. But, as in all other suits, the defendant must be notified of the pendency of the suit, and have a day in Court to make his defence. And the five days' notice prescribed in the Code, is the process and mode deemed proper by the Legislature for bringing the defendant in error into the Appellate Court. Such, in our judgment, is the intention of this requirement, and the proper construction to be given to it. And the effect is, that the defendant is not to be considered in Court until the service of such notice, nor can the case be heard until after the expiration of five days from the time of service thereof.

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This provision of the Code, with some modification, is copied from the act of 1794, ch. 1, sec. 37. But, although the provision of the latter act is more stringent in its terms than that re-enacted in the Code, yet since the passage of the act of 1811, ch. 72, sec. 12, a practice had grown up silently, which had been sanctioned by this Court, that it was sufficient if notice had been issued by the Clerk of the Supreme Court, after filing of the record in his office. And in view of this course of practice, and in accordance therewith, we suppose the provision of the Code was adopted, and intended to be understood.

It follows, that the motion must be disallowed.

 JOHN SIZEMORE v. THE STATE.

1. CRIMINAL LAW. *Counterfeiting. Indictment. Act of 1842, ch. 48.* Under the act of 1842, ch. 48, which, in substance, is incorporated into the Code, it is not necessary to aver in an indictment for fraudulently keeping in possession, or concealing counterfeit money, or bank notes, that the party charged, did so *with the intent to pass the same*.
2. SAME. *Same. Same. Act of 1842 constitutional.* The 9th sec. of the 1st Art. of the Constitution of Tennessee, provides, "That in all criminal prosecutions the accused hath a right, * * * to demand the nature and cause of the accusation against him." This provision does not refer to the *form* of the accusation, but to the accusation itself. It is left to the Legislature to prescribe in what form the crime shall be charged. The act of 1842 does not go beyond this, and is not in violation of the Constitution.
3. SAME. *Same. Not exclusively cognizable in the Federal Courts.* Although the offence of counterfeiting the coin of the United States, or of passing, or keeping it with the intent to circulate it, are offences against the United States, they are not *exclusively* cognizable in the Federal Courts. The Federal and State Governments are separate and distinct. Both are sovereign in the spheres assigned them. The coin of the United States is intended for the use of the people of all the States, and there can be no reason in denying to the States the power

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of protecting their citizens against the debasement of the universal currency, by the punishment of all the offenders against it within their borders; although the same are offences against the United States, and punishable in the Federal Courts.

FROM WASHINGTON.

The plaintiff in error was indicted and convicted in the Circuit Court of Washington county. He appealed, in error, to this Court. The facts, touching the questions raised, are stated in the opinion of the Court.

L. C. & M. T. HAYNES, for the plaintiff in error.

HEAD, Attorney General, for the State.

CARUTHERS, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the Circuit Court of Washington county, for fraudulently and feloniously keeping in his possession counterfeit coin of the denomination of quarter and half dollars. Neither the evidence or charge of the Court is given, but the appeal in error is from the judgment of the Court overruling the motion in arrest.

There are three counts in the indictment, and the conviction is upon the *second*. The first reason in arrest is upon the supposed insufficiency, in law, of this count. The imperfection relied upon is, that it does not charge that the base coin was kept in possession *with intent to pass the same*. In all other respects, it is admitted the count is good. So, the only question on this point is, whether that omission vitiates the indictment. To sustain the position that it does, we are referred to the case of *Fergus v. The State*, 6 Yer., 345, and of *Owen v. The State*, 5 Sneed, 495. That was certainly the well settled rule previous to the act of 1842, ch. 48. In § 5 of that act, it is provided that—

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“In indictments for fraudulently keeping in possession, or concealing counterfeit money, or bank notes, it shall *not be necessary to aver in the indictment that the party charged intended to pass or impose the counterfeit money, or bank notes, upon the community as good money*, but it must appear in proof that the counterfeit money, or notes, were so possessed and concealed, with fraudulent intent that they should get into circulation, and that the party charged *knew* the money or notes were counterfeit.”

This act was not brought to the notice of the Court in the late case of *Owen v. The State*, and the law, as settled in the case in 6 Yer., was incidentally recognized. It was not the point on which the case turned, and, perhaps, for that reason not particularly examined.

The statute of 1842, which is in substance contained in the Code, § 5135, certainly cures this indictment, and sustains the judgment of the Court in overruling the motion in arrest, so far as it rests upon that ground. There is no argument against a plain statute. It puts an end to reasoning, and stops investigation. Unless, indeed, it be in conflict with the Constitution, and then, of course, it is a nullity. It is argued that such is the case here. In the 9th sec. of the 1st art. of our Constitution, it is declared, “That in all criminal prosecutions the accused hath a right to be heard by himself and his counsel ; *to demand the nature and cause of the accusation against him, and to have a copy thereof.*” But it must be left to the Legislature to prescribe what shall constitute the “accusation”—in what form the crime shall be charged. A copy of this he has a constitutional right to demand. The Constitution has not prescribed the form in which the accusation shall be made. This is left for the Legislature, and it has performed that duty, in this regard.

2. The second reason in arrest is, that the offence of counterfeiting the coin of the United States, or of passing, or keeping it with intent to circulate it, are offences against the United States, and exclusively cognizable in the Federal Courts. The power to coin money and regulate the value

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thereof is confined to the General Government, and Congress, doubtless, has the power to provide for the punishment of all who may counterfeit it. But there is no prohibition upon the States to do the same. The two governments are separate and distinct. Both are sovereign in the spheres assigned to them. If the power to coin money is confined to the General Government, as it is, such coin is intended for the use of the people of all the States, and is, in fact, the only constitutional currency and lawful tender. If this be so, there could be no reason in denying to the States the power of protecting their citizens against the debasement of the universal currency, by the punishment of all offenders against it within its borders. Such power has been exercised in this State from its organization, and perhaps the same authority has been assumed in all the States. If it be an offence against the United States to counterfeit the public coin, which may be punished in *its Courts*, it is none the less an offence against the States where the same coin is made the circulating medium and lawful tender in payment of debts. The two authorities are not incompatible, nor is the case anomalous. But it is not intended now to go into an argument on this point, as the jurisdiction has been too long exercised, and is too well established, to be questioned. If Congress *could* restrict the power of the States on this subject, which is not admitted, it has not attempted to do so. We are referred by the Attorney General to 1 Bishop on Crim. Law, secs. 610 and 613; and 2d vol. of same, secs. from 227 to 239, where this subject is fully treated, and the jurisdiction of the States sustained.

There is no error in the judgment, and it is affirmed.

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EPHRAIM C. CARTER v. R. M. TAYLOR *et al.*

1. **CHANCERY JURISDICTION.** *Mortgage. When title re-vests.* Upon the execution of a mortgage, the legal title to the property conveyed passes out of the mortgagor and vests in the trustee or mortgagee; but upon payment, by the mortgagor, of the debts secured by the mortgage, the legal title to the property re-vests in him, and the mortgage cannot be set up against him in a court of law or equity.
2. **SAME.** *Same. Payment of debts by a third person.* If the mortgage debts are paid by a stranger to the instrument, he would be regarded as an assignee of the mortgage and might use it for his protection. This would not extinguish the legal title of the trustee; and if the party thus paying the debts secured has taken possession of the land conveyed, a Court of Chancery would entertain jurisdiction to adjust the equities and rights of the parties; restore the mortgagor to the possession of his land; refund to the party having paid the mortgage debts the amount paid, with interest, charging him with rents; and divest the title out of the trustee, and vest it in the mortgagor.
3. **SAME.** *To remove cloud from title.* If a cloud rests upon the title of a party to real estate, by reason of an unsatisfied mortgage, or a deed made without authority, such person has the right to come into a Court of Equity to have said cloud removed, and his title quieted and perfected.
4. **SAME.** *Partition when ordered.* A Court of Equity will not entertain a bill for partition until the legal title is settled; but if the titles are equitable, or there are equities to settle, a Court of Equity may be resorted to for this purpose: And having taken jurisdiction, a partition will be decreed, if a proper case is made out for partition.

FROM COCKE.

This cause was heard at the March Term, 1858, of the Chancery Court, before Chancellor LUCKY. His Honor being of the opinion that the Court had no jurisdiction of the cause, dismissed the bill. The complainant appealed.

J. P. SWAN and FLETCHER, for the complainant.

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BARTON & MCFARLAND, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Appeal from a decree, against the complainant dismissing his bill for want of jurisdiction in the Chancery Court at Newport, for Cocke county. The Chancellor was of opinion that the case was cognizable in a Court of Law, *alone*, by an action of ejectment, and, therefore, a Court of Equity could give no relief, nor entertain the case. And this is the first question.

Facts: The complainant and his two brothers, William and George, were the joint owners of a large tract of land in "Dutch Bottom," on French Broad river, Cocke county, by descent from their father, who died in 1831, and by purchase. They held it in common until 1839, when they agreed upon a partition in writing, signed by the parties, describing and setting apart the share of each; and after *that* held in severalty, according to the partition. The writing was not very formal, nor ever registered. It specified the boundaries between them with sufficient certainty, but did not expressly pass the title of each to the other. But it was always and is yet acknowledged by them as a valid and binding division, and the ownership and several possession were regulated by it. The joint debts against them were at the time very heavy, which were, as is alleged, mainly incurred for portions of said lands which they had purchased. The pressure of these debts was so heavy upon them that, in 1842, they found it necessary to secure their creditors by a deed of trust upon the land. This was made to Boardman, as trustee, for the benefit of himself and all other creditors, to the amount of twelve or fifteen thousand dollars. All three signed the deed of trust, which covered the whole of the land without any regard to the partition, or reference to it in the deed. By the exertions of the parties, with the indulgence of the trustee and beneficiaries, the debt was reduced, by 1847, to about six thousand dollars, without any sale of the property. At that time the complainant, whose health had declined, and his mind affected, as it is

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stated, went off to the South with a small drove of horses. He was expected to return in a few weeks, but did not do so for seven years. Without any apparent cause for it, but eccentricity of character, he kept his abode and movements secret, and had no correspondence with his mother, brothers, or friends. A rumor very soon got out that he was dead, and it seems to have been believed by his brothers and the neighbors generally. When he left he verbally authorized his brother, William, to take charge of and manage for him his property, real and personal, and apply the stock and increase to the common debts. On the 15th of February, 1849, about sixteen months after complainant left the country, the mortgage debts still remaining unpaid, under the *supposition*, as they allege, that he was dead, and his lands had descended to *his two brothers and his mother*, they made a sale of the most valuable portion of it to the Taylor brothers, for \$4,000, which, or the larger portion of it, as is recited in the bond for title that day executed by the three, was to be paid to the beneficiaries in the deed of trust, of 1842. In October, 1854, the trust debts having been paid by the Taylors, according to contract, a deed in fee, with warranty, was executed by the said William, George, and Esther Carter to the Taylors, in pursuance of the bond. Just before that was done, satisfactory information had been received that complainant was alive, of which both parties were apprized. He soon after returned, and filed this bill the next January, 1855. The object of the bill is to settle up the whole matter of the trust with his brothers, Boardman, the trustee, and the Taylors for the payments they have made of the trust debts; to have an account of rents and profits against his brothers and the Taylors for the use and possession of his land, by each, and to vacate the deed made by his brothers and mother without authority, of his land, and upon a full adjustment of the rights and equities of all the parties to have his land restored to him.

He instituted an action of ejectment against the Taylors contemporaneously with the filing of the bill. He was forced to elect, by order of the Court, in which tribunal he would

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proceed. He decided in favor of the Court of Equity, and his action of ejectment was dismissed. A demurrer to his bill was disallowed, with permission to rely upon it in the answer. Upon the final hearing the bill was dismissed upon the ground that a Court of Equity had no jurisdiction, but his remedy, if any he had, was at law. Upon the correctness of this opinion of the Chancellor, the argument has been made here. It seems very clear to us that his Honor erred, and that it is a case of equitable jurisdiction, on various grounds.

1. The legal title of the complainant passed into Boardman by virtue of the deed of trust, or mortgage, of 1842. Technically, it could only re-invest by a re-conveyance of the trustee, or by decree upon foreclosure. But it has been held, and is well settled, that it cannot be set up against the mortgagor after the debts secured by it are paid off by him, even at law; but if a stranger to the deed had paid it off, he would be regarded as assignee, and might use it for his protection in a suit brought against him for the land. This is decided in the case of *Peltz v. Clark*, 5 Peters, 482. It is not then the payment of the mortgage debts that avoids the technical difficulty, and vacates the mortgagee's legal title, but it is the payment by the mortgagor. In which case, the debt being extinguished, the security for it is as if it never had been, and the title returns to the former owner. Not so, in reason or in law, where the payment is by a stranger to the deed. In that case the mortgage is bought in by him with the debt, and still stands as a security for it. That was the case here. The Taylors paid \$2,800 of the mortgage debts, and by that are substituted to the rights of the creditors. The title would still remain in the trustee, Boardman, for their security to the extent of their payments. From this it must follow that complainant could not have succeeded in his action of ejectment, as the outstanding mortgage could have been used by the Taylors as an ample protection against him. But, independent of that, the mortgage was not in fact fully paid off. One of the debts, amounting to something less than one hundred dollars was still unpaid, and is yet, from all we see. True

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this was a debt to the trustee, and it seems he did not desire the benefit of the security of the mortgage, but he had not relinquished or re-conveyed.

The remedy at law was, therefore, closed against complainant. But he certainly had a right to come into a Court of Equity to have the mortgage foreclosed, and the rights of all the parties adjusted.

The defendants would be entitled to a lien upon the land for the amount they had paid towards the debts, for they are regarded as the assignees of the mortgage creditors, entitled to stand in their shoes, and have the advantage of their securities. But they would, of course, be chargeable with rents for the time they have been in possession of the land. The other defendants, George and William Carter, would be liable to account for the use of the land by them, and whatever they may have paid of the debts out of the effects of the complainant. In this the Taylors are not complicated; but having become equitable assignees of the mortgage in part, they are so connected with the matters as to be proper parties.

Another ground might be stated, under this head, to sustain the jurisdiction of a Court of Equity. The partition made in 1839, though in writing, so as to avoid the statute of frauds, does not, perhaps, create a perfect legal title, as it does not purport to convey to each of the tenants in common, from the others, a right in severalty to the portions allotted to each. However this may be, there can be no doubt but that an equitable right in severalty is created by the writing, and a Court of Equity would make it perfect by investing and divesting the legal title in conformity with the written agreement of partition. They held the perfect legal title in common then, unincumbered, and the only object of the deed of 1839, between them, was to sever their joint interest, and designate the one-third to which each should be entitled. This is clearly and explicitly done, and to it no objection is yet made, and a Court of Equity will carry it out. The joint mortgage, upon the whole, has no other effect than to encumber the whole—the one-third of each, alike, for the common debt. Here, then,

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is a proper matter for a Court of Equity to adjust, by apportioning the mortgage debts, inclusive of those paid by the Taylors, among the three, so as to make them equal in the burthen upon a final settlement.

2. The Taylors are in possession without title, as the brothers of complainant who sold and conveyed to them, it is clear, had no right to convey *his* land. But they connect themselves with the matter by the payment of the secured debts, and by substitution to the rights of the creditors under the mortgage. So, although they have no rights under their purchase, yet they have under the mortgage. Their interest is to the extent of their payments, and no further. The complainant has a right to bring them into a Court of Equity for a *discovery* of the amount of their payments, and the benefits they have received from the trust property, by its use, or otherwise. So he has also a right to call upon his brothers, the other defendants, for the same purpose. For all this a Court of Chancery is the proper forum.

3. He has a right to come into this Court to clear his title of the clouds resting upon it by the deed to the Taylors, as well as the mortgage deed, even if it had been fully paid off.

Other grounds of jurisdiction might be stated, but they need not, as the foregoing are sufficient.

It is contended that a Court of Equity will not entertain a bill for partition until the legal title is settled. But this is not a bill for partition. It is to settle equities in relation to land already partitioned, at least in view of a Court of Chancery. But even where the object is to partition, but the titles are equitable, or there are equities to settle, a Court of Equity may be resorted to for this purpose; and having done so, will decree partition under the same bill. 1 Story's Eq., § 650, and the following sections.

Having settled the question of jurisdiction, and determined to entertain the case for relief, there can be but little difficulty in drawing up a decree for that purpose.

The proper accounts will be ordered, for which the cause will be remanded.

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With the details of the decree this opinion need not be encumbered. They are sufficiently indicated in what we have said, and will, doubtless, be readily agreed upon by counsel under the verbal directions of the Court.

JOHN MAYSE v. JOHN BIGGS AND WIFE.

1. **CHANCERY PRACTICE.** *Bill dismissed upon motion to dissolve the injunction.* If the complainant shows upon the face of his bill, that he would be entitled to no relief if the allegations were sustained by proof, it is not error to dismiss the bill upon a motion to dissolve the injunction.
2. **SAME.** *Same. Remanding cause.* If a cause is prematurely heard and the bill dismissed, it will not be remanded for that reason, if it could have no other effect than to produce delay, and increase costs.
8. **STAY OF EXECUTION.** *Contract. Construction. Evidence.* If a debtor endorse on a note, "I confess judgment on the within note, and claim a stay of eight months," the legal implication is, that security is to be given; and it is not admissible to prove a verbal agreement that the debtor is to have the benefit of a stay of eight months without security, because it is contradictory of the writing.
4. **SAME.** *Same. Husband not bound by the agreement of his wife.* If an agreement is made by the payor of a note, with the wife, to confess judgment upon the note, upon condition that he is to have the benefit of a stay of eight months without security, in the absence and without the knowledge of her husband, in whom is the legal interest; such agreement is void and cannot be enforced against the husband.

FROM GRAINGER.

This bill was filed for the reasons stated in the opinion of the Court. At the appearance term, the defendants put in an answer, and entered a motion for a dissolution of the in-

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junction. Upon the hearing of said motion, his Honor, Chancellor LUCKY, dismissed the bill. The complainant appealed.

SHIELDS and JARNAGIN, for the complainant.

NETHERLAND and HEISKELL, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an injunction bill. The complainant alleges, in substance, that he agreed to confess judgment in favor of the defendants, before a justice, on certain notes executed by him payable to Mrs. Biggs; which agreement was written on the back of the notes. And pursuant to this agreement, judgments were accordingly entered up by the justice. Complainant further alleges, that it was expressly agreed at the time, that he "should have the benefit of the lawful stay of eight months, without being required to give any security;" and upon the faith that this latter stipulation would be observed, he consented to confess judgment. The bill further charges, that, as soon as the two days allowed for giving security for the stay of execution had expired, the defendants caused executions to be issued and placed in the hands of an officer, who was proceeding to enforce the same. It is further charged, that the purpose of defendants, in procuring the foregoing agreement to be made, was to deceive and defraud the complainant. The bill seeks to enjoin the executions until after the expiration of eight months from the rendition of the judgment.

At the appearance term, the defendants put in their answers, in which they expressly deny that any agreement whatever was made in regard to the stay of execution; and that the whole extent of the agreement made was, that complainant should confess judgment. Mrs. Biggs, with whom the agreement was made, states, that the complainant endorsed the agreement on the back of the note, as follows: "I confess judgment on the within note, and claim a stay of eight

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months." She further states, that she cannot read, and that the endorsement was not read to her, and she had no knowledge that the words, in respect to a stay of execution, had been added; and denies having assented to any such thing.

Upon filing the answers, a motion was entered to dissolve the injunction; and on the hearing, the Chancellor allowed the motion and dissolved the injunction, and also dismissed the bill.

It is argued for the complainant, that the Chancellor erred in dismissing the bill at the appearance term, and upon a motion to dissolve the injunction. We do not think so, in view of the whole case. It is obvious there is no equity in the complainant's favor. If he were able to prove a *verbal* agreement, that "he was to have the benefit of a stay of eight months, without security," such proof would avail him nothing, in the face of the written memorandum; the evidence would not be admissible, because contradictory of the writing. The "claim of a stay of eight months," all other objections aside, cannot be understood to imply, that *security* was to be dispensed with; the contrary would be the legal implication. But, again: the objection that this agreement, if valid in other respects, was made with the wife, in the absence and without the knowledge of her husband, in whom the legal interest was, would perhaps be a sufficient defence to the bill.

It is clear, therefore, that there is no substantial error in the decree or proceedings in this cause. If it were admitted that the cause was prematurely heard and the bill dismissed; to remand the cause, for that reason, could have no other effect than to produce delay and increase costs.

Decree affirmed.

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NATHAN ALMONY AND WIFE v. NATHANIEL HICKS *et al.*

1. **CHANCERY JURISDICTION.** *Rule as to relief.* If a Court of Chancery has obtained jurisdiction of a cause for any purpose, it will retain it until the whole matter is disposed of, and the rights of the parties settled.
2. **SAME.** *Cloud upon title. Void deed.* A Court of Chancery has jurisdiction to remove a *cloud* from the title of a party claiming real estate, by cancelling a void, or voidable deed. This jurisdiction will be exercised whether the character of the deed, or other instrument complained of, appears upon its face, or otherwise; and, although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the land, that not being esteemed adequate relief.
3. **SAME.** *Same. Pleading.* A bill to remove a *cloud* from the title to real estate need not ask any discovery, or state any defect of proof, or the witnesses whose proof is relied upon for the relief. A simple statement, that the instrument is void, or voidable, with the proper prayer, is sufficient.
4. **SAME.** *Partition. Demurrer.* A Court of Chancery has no jurisdiction to decree a partition of lands while the title is in dispute, and if this fact appears upon the face of the bill, it will be dismissed upon demurrer. But if the bill alleges other grounds of equitable relief, or an amended bill is filed abandoning the question of partition, and making out a proper case for relief, a general demurrer will not be sustained. See *Carter v. Taylor et al.*

FROM SULLIVAN.

The case made out by the original and amended bill, is, that William Hicks died intestate, in 1843, seized and possessed of two tracts of land. He left several heirs, the complainant, Sarah, being one. She intermarried with Nathan Almony previous to the death of her father. Her husband is still living.

Some short time after the death of William Hicks, a portion of the heirs met and signed an instrument of writing, in which they relinquished to William Hicks, jr., and Nathaniel

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Hicks all the personal and real estate of the intestate, in consideration of their paying the debts of the estate. The name of the complainant, Nathan Almony, is to said instrument, but it was not put there by him, or by his authority. William Hicks, jr., and Nathaniel Hicks fraudulently procured the execution of said instrument from those who did sign it, by misrepresentations as to the debts of the estate.

Since the death of William Hicks, Nathaniel Hicks has produced a conveyance of the one hundred and five acres, from the deceased, to himself, bearing date 1st January, 1842. It was not witnessed by two witnesses—was never delivered, nor intended to be perfected, the consideration not having passed. Said conveyance was not considered by the parties as binding. The deceased remained in possession of the land until his death, and the heirs retained it until the pretended release, in 1848.

The original bill prayed for partition, and that the pretended titles of the defendants be declared void, and the complainants be restored to the possession of their interest in the lands—an account to be taken of the rents and profits, and the amount due them be paid. The amended bill does not pray for a partition.

The bills were demurred to, and the demurrer sustained by Chancellor LUCKY. The complainants appealed.

R. ARNOLD, for the complainants.

NETHERLAND & HEISKELL, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The demurrer was not well taken, and the Chancellor erred in dismissing the bill, and amended bill.

The question is, whether the bill and amendment, taken together, make a proper case for equitable relief? It is true that in the original bill partition was asked, and to that extent—if the demurrer had been confined to that part of the bill—it might have been a question whether it were not proper

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—the title not being clear. But we understand the amended bill to abandon this branch of the case, and to confine itself to a claim for relief upon the ground of removing *clouds* from the share of complainant, Sarah, in the lands inherited from her father. There is also a prayer to be restored to the possession, and to have a decree for rents.

There is nothing in the bill, or amended bill, to show that defendants have had seven years' possession of this land, or that the rights of complainants have, in any way, been affected by the statute of limitations. They are both, therefore, immediately interested in the share of complainant, Sarah, and entitled to the possession and rents.

And these will be decreed them, if the Court of Chancery has jurisdiction for any purpose; the rule being, if relief can be given as to anything, to retain the case until the whole matter is disposed of, and the rights of the parties settled. 2 Yer., 524, 531; 10 Yer., 59, 83.

As to the deed purporting to have been executed by Wm. Hicks, sr., in his lifetime, the bill, we think, makes a proper case for relief. The defendant, Nathaniel Hicks, since his father's death, has procured this deed to be proved by a witness, and registered. Its invalidity does not appear upon its face, but, if it exists, must be made out by proof *aliunde*, and according to the rule laid down by Judge Story, sec. 700, *a*, furnishes a proper case for the interference of a Court of Equity. The bill alleges that this deed is void; and the amended bill, in effect, alleges that its execution was never completed, and that it had been abandoned by the parties. If so, it should be cancelled. The invalid deed of the ancestor, must, we think, be regarded as a *cloud* upon the lands in the hands of the heirs.

In *Jones v. Perry*, 10 Yer., 83, the rule is stated to be settled in this State and elsewhere, that a Court of Equity has the power to cancel a void instrument, whether its character, as such, appear from the face of the instrument, or otherwise.

If this be so, it is not perceived why the jurisdiction is not proper, as to the instrument to which Almony's name is al-

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leged to have been forged, and the deeds to Worley. But be this as it may, the demurrer being to the whole bill, lost its effect entirely.

A bill to remove a *cloud*, is a head of equity by itself. It will lie, although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the property, that not being esteemed adequate relief. 2 Yer., 524; 10 Yer., 59, 83.

It need not ask any discovery, or state any defect of proof, or the witnesses whose testimony is relied upon for the relief. A simple statement that the instrument is void, or voidable, with the proper prayer, is sufficient. Story's Eq., sec. 699, 705 *a*.

It is not like a bill to perpetuate testimony, since the matter involved in it can be made the subject of immediate judicial investigation and decree. Story's Eq., sec. 1505, 1508. And we are not aware, that in this respect, it differs from an ordinary bill.

How the facts may turn out to be, upon an answer, we can not know. We think the facts stated in this bill and amendment require an answer; and, therefore, reverse the Chancellor's decree, and remand the cause for that purpose.

THE STATE v. LAFAYETTE SHULL.

1. **CRIMINAL LAW.** *Venue.* It is not essential to the laying of the venue in an indictment or presentment, that the county should be repeated in the body of the same. It is sufficient if the county be stated in the caption; and is then referred to as the county aforesaid, then and there, &c.
2. **SAME.** *Same.* *Presentments.* Code, § 5025. Section 5025 of the Code, provides that it shall not be necessary for an indictment to allege where the offence was committed; but the proof shall show that

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it was committed within the jurisdiction of the Court. Although presentments are not, in terms, embraced, it was the intention of the Legislature to include them.

FROM JOHNSON.

At the March Term, 1859, of the Circuit Court of Johnson county, Judge PATTERSON quashed the presentment, upon the ground that the *venue* was not sufficiently laid; and the 5025 section of the Code did not dispense with the same in presentments. The State appealed.

HEAD, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

The Circuit Court quashed the presentment upon the ground that the *venue* was not sufficiently laid. This is error. In the caption of the presentment, the State and county are stated, and the presentment itself contains the averment that the grand jurors are empanelled to inquire for the body of *the county aforesaid*, and then proceeds as follows: "On their oath aforesaid present that a certain Lafayette Shull, heretofore, to wit, on the first day of June, in the year of our Lord, one thousand eight hundred and fifty-eight, in a *certain public place*, then and *there situate*, and in the hearing of divers good citizens, then and *there* being, and in the hearing of a certain public assembly, then and *there* assembled and gathered together, did, then and *there*, utter and publish, &c." The words, in a *certain public place there situate*, and *there*, as used in this presentment, refer to the county as mentioned in the caption and body of the presentment, and renders it sufficient in this respect. In *Jacobs v. The Commonwealth*, 5 Serg. and Rawle, 315, it was held that the day of the commission of the offence might be rendered certain by reference to the year stated in the caption.

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Again: we think it was unnecessary to state any venue. The Code, in sec. 5125, provides that it shall not be necessary for the indictment to allege where the offence was committed, but the proof shall show a state of facts bringing the offence within the jurisdiction of the county in which the indictment was preferred. It is true that a presentment is not here embraced in terms; but there can be no reason why the venue should be laid in a presentment and not in an indictment. The distinction, in common sense, cannot exist; and we are satisfied, from an examination of the chapter in the Code in which the section is found, that none was intended.

Reverse the judgment, and remand the cause to the Circuit Court of Johnson county, to the end the defendant may be arraigned and tried upon the presentment.

MARY A. TRAYNOR v. THOMAS W. JOHNSON.

1. SLAVES. *Rights of owner and hirer.* Between the owner and hirer of a slave, there is a personal trust and confidence reposed, and a contract implied by law, which forbids the hirer to transfer the possession or services of the slave to a third person without the owner's consent.
2. SAME. *Same. Trover. Case.* For a violation of this implied obligation the owner may, in general, maintain either *trover* or *case* at his election. A simple violation of this implied contract, irrespective of the consequences, constitutes, of itself, a sufficient ground of action and the owner may elect to treat it as a conversion, or sue in case.
3. SAME. *Same. Same. Same. Measure of damages.* In *trover*, for the conversion, the owner is entitled to recover the value of the slave. In an action on the case, he is entitled to recover damages commensurate with the injury. If no injury accrues, and the slave is returned at the end of the year, the owner is entitled to some amount

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of damages for the mere violation of the implied contract not to sub-hire. In the event the negro dies while in the possession of the sub-hirer, the lowest measure of damages would be the value of the slave *

FROM BRADLEY.

On the 10th of March, 1856, the defendant, who kept a public hotel, hired the slave of the plaintiff upon the express agreement that he was to be employed as a servant in the hotel. On the first of May the defendant sub-hired said slave to the Messrs. Cowan, to work in a brick-yard. At the time he hired the slave from the plaintiff, he was informed that the plaintiff would not suffer the slave to work in a brick-yard. In the month of June, while at work in the brick-yard, the boy was taken ill with a violent dysentery, and died in a few days. On the fifth day after the attack a physician was called in. In a short time after the physician was called in, he saw the plaintiff, and suggested to her that she had better have the slave brought to her house, where she could have him attended. The cause was heard before Judge GAUT. Verdi and judgment for the defendant. The plaintiff appealed.

ROWLES, for the plaintiff.

HOYLE and EDWARDS, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This case was before us at the last term, and was remanded for a new trial. We refer to the opinion then delivered for a statement of the material facts of the case, which are no materially changed by any thing in the present record.

After the case was remanded, there was another trial, and the jury again found for the defendant. From all that ap-

* See *Traynor v. Johnson*, 1 Head, 51.

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pears in the record before us, this was certainly a strange and inexplicable result.

The question, whether the plaintiff, with knowledge of her rights, received back the slave into her possession, intending thereby deliberately to waive the technical conversion, cannot, upon this record, be satisfactorily answered in the affirmative, in our judgment. But, if it were to be conceded, that under our practice, this question is concluded by the verdict; still, the further question remains, can the verdict, as respects the counts *in case*, be supported upon the facts found? We unhesitatingly say, that it cannot. Upon the latter counts, a clear case for a recovery is made out. It is well settled, in our local jurisprudence, that between the owner and hirer of a slave, there is a personal trust and confidence reposed, and a contract implied by law, which forbids the hirer to transfer the possession or services of the slave to a third person, without the owner's consent. For a violation of this implied obligation, the owner may, in general, maintain either *trover* or *case*, at his election. The simple violation of this implied contract, irrespective of the consequences, constitutes, of itself, a sufficient ground of action. It is a *conversion*, in law, and entitles the owner, in an action of *trover*, to recover the value of the slave; and, in an action on the case, to damages commensurate with the injury.

In this view, the plaintiff had a well established right of action, *in case*, to recover some amount of damages for the mere violation of the implied contract, even if no injury had befallen the slave, in consequence thereof, and he had been returned to the plaintiff, at the end of the year, without diminution of value.

But, upon the facts of this case, the plaintiff's right of recovery cannot be restricted to damages for the mere breach of the implied obligation not to *sub-hire* the slave, without the owner's consent. There are circumstances of serious aggravation in the case. The defendant was substantially informed, at the time he hired the slave, that the plaintiff would not allow him to be hired to the Messrs. Cowan, on account of the

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nature of the employment, though higher wages could be obtained from them than were asked from the defendant; and notwithstanding this, the defendant, after retaining the slave some two months, hired him to the Messrs. Cowan, for the remaining ten months, and for a sum nearly equal to the amount which, by his contract, he was to pay the plaintiff for the entire year's services of the slave. And the slave, instead of rendering house service, was put to labor out of doors, exposed to the sun, in midsummer; and other exposures incident to a brick-yard; and when taken ill with a dangerous disease, no physician was called in until the fifth day after the attack. This presents a case of a wilful and aggravated violation of the rights of the plaintiff, and of a reckless disregard of duty on the part of the defendant, for which a jury would be warranted in giving the highest measure of damages. And as the slave was lost to the plaintiff, while in the possession of the sub-hirer, the lowest measure of damages should be the value of the slave, upon which interest, by way of damages, might be allowed by the jury.

The jury were not fully or correctly instructed in respect to the plaintiff's right of recovery on the counts *in case*; and the verdict, on *these* counts, is without the shadow of evidence to support it.

The judgment, therefore, will be reversed, and the case be remanded for a new trial, upon all the counts of the declaration.

CORNELIUS BOWMAN *et al.* v. ADDISON BOWMAN *et al.*

1. LAND LAW. *Ejectment. Title. Possession.* In an action of ejectment, if the plaintiff shows a legal title, and that the defendant is in possession of a part of the land covered by such title, he is entitled

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to recover, in the absence of proof, by the defendant, of a superior title in himself, or, outstanding in another.

2. **SAME. Same. Grant. Possession. Onus of proof.** If there are tracts of land within the bounds of the plaintiff's grant, excepted by it, the *onus* of proving the locality of such excluded lands; and that the defendant's possession is within the bounds of the excepted tracts, is upon the latter; and, in the absence of such proof, the plaintiff is entitled to recover.
3. **SAME. Fraud in procuring grant.** The question of fraud in procuring a grant is a matter, exclusively, between the State and grantee; and a mere trespasser, or subsequent enterer, has nothing to do with it. If the State acquiesces in the grant, the legal title to all the lands within its boundaries, not shown to be held by superior title, is vested in the grantee.

FROM CLAIBORNE.

This was an action of ejectment, instituted in the Circuit Court of Claiborne county. At the May Term, 1859, the cause was tried before Judge TURLEY, and the jury returned a verdict in favor of the defendants. A motion for a new trial having been overruled, the plaintiffs appealed in error to this Court.

THOMAS, EVANS, and MAYNARD, for the plaintiffs.

NETHERLAND & HEISKELL for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an action of ejectment for a tract of land lying in Claiborne county.

The plaintiff claims under a grant from the State of Kentucky, issued in pursuance of the convention agreed upon between Tennessee and Kentucky, in 1820, adjusting the boundary line between these two States—the land in controversy being situated between Walker's line and latitude 36° 30'.

The grant was issued on the 25th of July, 1858, to Cor-

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nelius Bowman, the plaintiff; and purports to be for one thousand four hundred acres of land, surveyed on the 20th of September, 1836. It appears, however, that the exterior boundaries of the grant, as therein defined, contain upwards of six thousand acres. Upon the face of the grant, and immediately following the description of the boundary lines of the land, are these words: "Plotting out the lands previously surveyed, represented to me, by the aforesaid Cornelius Bowman, to be 4000 acres."

The surveyor who, in 1836, made the survey on which said grant is founded, was examined on the trial, and stated that when he made said survey, it was represented to him by said Bowman, that within the boundaries stated in said survey and grant, there were not less than four thousand acres of land, previously granted, or held by prior legal surveys; and that upon this statement of Bowman, (which was the only evidence he had,) he reported the fact to be so in his certificate of survey.

Neither in the certificate of survey, nor in the grant, is there anything to identify the lands assumed to have been held by prior patents or surveys. Nor, indeed, is there any thing in the whole record to show that, in fact, any portion of the land embraced within the boundaries described in said grant, had been previously appropriated either by patent or survey, except two tracts—one purporting to contain fifty, and the other one hundred and fifty acres, which the said Bowman had procured to be surveyed in 1833, but for which patents were not obtained until the 20th of December, 1854.

The defendants, who were in possession of a small portion of the land within the exterior boundary of the one thousand four hundred acre patent, at the time this action was commenced, proudded no title whatever.

Upon this state of the case, it was insisted by the counsel for defendants, on the trial, that as it was incumbent on the plaintiff to show a legal title to the land sued for, and also to show that the defendants were in possession of some part of the land covered by such title; and as the plaintiff could have

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no title to the four thousand acres excepted out of the grant, he could not recover in this action without showing, affirmatively, that the land occupied by the defendants lay outside of the boundaries of the four thousand acres excluded from his grant, and within the limits to which, by his grant, he had a rightful legal title. And the Court concurring in this view of the law, instructed the jury accordingly, and verdict and judgment were rendered for the defendants.

Upon the state of this record it cannot be assumed that, in point of fact, any portion of the land included in the boundaries of the fourteen hundred acre patent had been previously appropriated, except the two small tracts of fifty and one hundred and fifty acres above mentioned. It may be true, that the representation made by Bowman to the surveyor, that four thousand acres of the land embraced by the survey had been previously surveyed, was either an innocent mistake on his part, or an intentional falsehood; but whether the one or the other, the result is the same, so far as the present determination is concerned. The question is one exclusively between the State and the grantee, with which a mere trespasser, or subsequent enterer, has nothing to do. The injury, whether committed by mistake or fraud, is against the State, and can only be complained of by the State; and if the State acquiesces, and allows the grant to stand, there can be no question but that, in a Court of Law, it must be regarded as investing the grantee with a legal title to all the land included by its boundaries, not shown to be held by a superior title. As between the parties, in this action, the question of fraud or mistake is altogether irrelevant.

In this view of the case, the judgment of the Circuit Court is clearly erroneous. The plaintiff having shown a *prima facie* legal title, and that the defendants were in possession of part of the land covered by such title, was entitled to recover, in the absence of proof of a better title in the defendants, or outstanding in another, or some other legal defence. 1 Swan's Rep., 333-336.

Judgment reversed.

State for the use of Thomas D. Arnold v. Jno. D. Linaweaver.

STATE FOR THE USE OF THOS. D. ARNOLD v. JNO. B. LIN-
AWEAVER.

1. **GARNISHMENT. Partners. Notice.** A *garnishment* is in the nature of an attachment, and upon its service the property, effects, or debt in the hands of the garnishee is in the custody of the law; and beyond the control of, either the garnishee, or the judgment debtor. The service of a garnishment upon one member of a firm that is indebted to the defendant in the execution, is notice to all the members of said firm; and a payment of the debt by a partner, in ignorance of the service of such garnishment, to the debtor, does not discharge the garnishee from liability to the execution creditor.
2. **SAME. Costs.** If a garnishment is successfully prosecuted against the person summoned, and the funds in his hands are not sufficient to pay the debt and costs, and the costs of said proceedings by garnishment—the garnishee not having resisted and appealed from the judgment against him—the execution creditor is liable for, and should be taxed with the costs. The garnishee is in no fault, and is not liable for the costs.

FROM WASHINGTON.

The defendant was summoned as a garnishee. He appeared and filed his answer in writing, which is set out in the opinion of the Court. The Court below rendered judgment, discharging the garnishee, and the execution creditor appealed.

T. D. ARNOLD, for the plaintiff.

DEADERICK, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

A *fi. fa.* from the Circuit Court of Washington county, in favor of the State of Tennessee for the use of Thos. D. Arnold, against Furguson, Green, Clark & Crawford, for \$119.71, was placed in the hands of the sheriff, on the 2d of March,

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1859. The return was, no property found, but that John B. Linaweaver was garnisheed as the debtor of Clark, one of the defendants in the execution. At the next term he appeared, and upon his examination, made the following statement, which was reduced to writing:

"W. T. Battles and myself purchased a horse of J. P. Clark for \$100, which we drove off South, and owed him for the same at the time I was garnisheed. We went together with horses to sell. Battles paid the debt to Clark after his return, without my knowledge. I returned first. I wrote to Battles I was garnisheed, before his return a short time. I don't know whether he received my letter; and he paid the note to Clark after his return before I saw him. After he had paid the debt I saw him, and told him I was garnisheed, and would hold him responsible, if I had it to pay, for his portion. Battles did not say anything about the letter I had written to him, nor did he say he did or did not know I was garnisheed. Some three weeks or more since, I had the foregoing conversation with Battles, and it was only a short time before he paid the money, and he had not been long back from the South. He came back near the 1st of May. We had a settlement at this time, and I had lifted more of our notes than he had. We had previously given a number of joint notes, for horses we had bought in partnership. I told Clark the next morning after I was garnisheed about it."

This is the entire statement, and the Court thought it did not make out a case of liability, and discharged the garnishee; from which judgment this appeal was taken by the creditor. We think his Honor erred in this conclusion. It does not appear upon what ground he based his opinion, but it is sustained in argument upon the ground that as the garnishment was not served upon Battles, and it is not shown that he had any notice of the proceedings, he could, as partner, safely pay the debt of the firm to Clark, and thereby defeat the garnishment. Though this position may be plausible, we think it unsound. It was the debt of the two as a firm, and was subject to appropriation to the creditors of Clark by this mode of proceed-

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ing. The moment the garnishment was served, the debt, being then due, passed out of the control of both the debtors and creditor, and, so to speak, was in custody of the law. Notice to one partner would bind both, and neither could avoid the binding force of the garnishment. The money of Clark in the hands of the firm was attached, and could not be extricated by one member of the firm, more than the other. The debt was seized in a legal mode, and Clark had no longer any right to receive it, and a payment to him would have no more effect to relieve them, than if it had been to any other person. The law had made them the debtors of the plaintiffs in the execution, instead of Clark. Battles was bound to know that his partner had become bound by law, to pay the debt to others, and not to Clark, in which event he would be no longer their creditor, and consequently a payment to him would be no discharge. It is the same thing as if he had paid the debt to Clark, after it had been previously discharged by his partner. The attachment of the debt by the creditors of Clark, substituted them to all the rights of the latter, and deprived him of any authority to receive the money, as fully as if it had been once paid to him by the garnisheed partner. The effect of the garnishment was to bind the debt, and place it out of the power of the parties,—no change could affect the creditors, as their right to the money was fixed by law, upon the state of facts at the date of service.

Independent of this view, which we think conclusive against the defence made, the circumstances pretty clearly show that Battles must have known of the existence of the garnishment, if that were necessary, and fraudulently attempted in this way to defeat it, and favor Clark. But let that be as it may, upon the other ground, we are of opinion that the judgment should have been against the garnishee. The partners will be left to adjust their rights as best they may, for this double payment of the debt. With that we have nothing now to do.

The judgment will, therefore, be reversed, and judgment rendered here against the garnishee for the proper amount.

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Since the disposition of the above case, a question has arisen upon the proper disposition of the costs of the garnishment, which it may be of some importance in the practice to settle. By the Code, sec. 3102,—

“The garnishee shall have the pay, and be entitled to the privileges of a witness, and shall recover cost against the plaintiff, *if the garnishment is not successfully prosecuted.*”

This would *seem* to imply that if the plaintiff was successful in rendering him liable that he should pay costs. This section is, in substance, or was, doubtless, intended to adopt the act of 1826, ch. 17, Car. and Nich., 364. Under that act, this Court held in *Huff v. Mills*, 7 Yer., 42, 46, the garnishee was not subject to costs, although the judgment was against him, but that the plaintiff in the execution should pay them. We think there was no intention to change that rule by the Code. The justice and reason of the case accord with that construction. The garnishee is in no fault. He could not pay the debt he owed the execution debtor to his creditor, without the judgment of a Court. He fairly discloses the facts which establish his liability, and submits to the judgment of the Court. It is nothing to him to whom he pays the debt, provided he does it according to law, so as to get a legal discharge. The whole proceeding, and the result, is for the benefit of the execution creditor, and it is right that he should pay the cost, rather than the garnishee, who is in no wrong. The execution debtor cannot be taxed, because he is not a party to the proceeding. We think it right to adhere to the rule established in the case of *Huff v. Mills*, under the act of 1826, as we think it just, and the Code does not change it. How it would be if the garnishee had resisted and appealed from a judgment against him, or if the fund in his hands was more than sufficient to pay the execution and cost, we need not now say, as that is not the case in judgment.

The cost of both Courts will be taxed to the garnishing creditor.

J. W. Clark, for the use of Butler v. G. M. Cuson.

J. W. CLARK, FOR THE USE OF BUTLER v. G. M. CUSON.

1. *CONTRACT. Obligation to deliver specific articles. When place of delivery fixed.* If, in an obligation for the delivery of specific articles, the time and place of delivery are fixed in the face of the instrument the property must be delivered at the place designated. A delivery at a place near the one specified, is not sufficient.
2. *SAME. Same. Same. Evidence not admissible to change the place of delivery.* Parol evidence is inadmissible to show that it was the understanding of the parties that the property should be delivered at a place different from the one designated in the obligation.

FROM MONROE.

This cause was tried upon an appeal, at the May Term, 1858, WELCKER, J., presiding. Verdict and judgment for the defendant. The plaintiff appealed.

EAKIN, for the plaintiff.

NEAL, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a justice of Monroe county, and was taken, by appeal, to the Circuit Court. Verdict and judgment were rendered for the defendant, and an appeal in error to this Court.

The suit is founded upon an obligation executed by Cuson to Clark, for \$125.00, "which may be discharged in good merchantable upper leather, at sixty cents per pound, to be delivered at *Sweet Water Depot*, against the 25th of December, 1857."

The proof shows, that on the 25th of December, 1857, the defendant deposited a parcel of upper leather in the store of

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Spillman & Vaughn, in the town of Sweet Water, for the plaintiff. It appears that the leather was of good quality ; and that the quantity was of the value, at sixty cents per pound, of more than \$125.00. It further appears, that the store of Spillman & Vaughn "was *near* the depot," but entirely disconnected with it; the distance between the places is not stated.

The jury were instructed by his Honor, the Circuit Judge, "that if there was an understanding between the plaintiff and defendant, that the leather should be delivered at the store near to the depot, and it was so delivered on the day specified in the contract, it would be a satisfaction," &c.

This instruction, we think, was erroneous. We perceive no sufficient evidence in this record of any such "understanding" between the parties. But, if such a *verbal* agreement had been made, it would have been inadmissible, on the ground, that it is directly contradictory of the written instrument, which fixes a definite place for the delivery of the leather. The proximity of the *store* to the *depot*, is a matter altogether irrelevant. A definite place being fixed in the instrument, the delivery must be at *that* place.

Judgment reversed.

JOSEPH JOHNSON v. DANIEL H. HOYLE *et al.*

1. **ADVANCEMENTS.** *Presumption, when debt of child paid by the father.* If a father pay a debt for a child, in the absence of proof to the contrary, the law presumes such payment to be an advancement. This presumption, however, may be rebutted by proof that it was intended to be holden as a debt against the child.
2. **SAME. Creditors. Attachment. Advancements to be first accounted for.** If a distributee or heir has been advanced, the advancements are to be collated and accounted for before an attaching creditor of such distributee or heir can have satisfaction of his debt.

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- 3 **SAME.** *Question reserved.* Can the attaching creditor sue within six months after the qualification of the personal representative?
- 4 **SAME.** *Same.* If a distributee or heir is indebted to the estate, will such debt have priority over an attaching creditor?

FROM M'MINN.

The complainant appealed from the decree pronounced by Chancellor VAN DYKE.

COOKE, for the complainant.

JARNAGIN and CALDWELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed early in July, 1857, to attach, and hold subject to complainant's debt, the interest of Daniel H. Hoyle, his debtor, in both the personal and real estate of his father, John Hoyle, who had recently died intestate, in McMinn county. The administrator, and the other heirs and distributees, were made defendants. It charges that the said Daniel H. is entitled to the one-tenth of his father's estate; that he resides in the State of Georgia, is insolvent, and justly owes him the amount stated and claimed in the bill.

The bill was filed within six months from the appointment of the administrator, T. P. Wells, and a question is made by demurrer upon that, but without giving any opinion upon that question, one way or the other, we will pass to the consideration of the case as made by the answers and proof, after the overruling of the demurrer by the Chancellor. It is better for the parties to settle the controversy, finally, by deciding the case upon its merits.

It is admitted that the said Daniel H. is indebted to the complainant; but the defence is that he owes the estate a

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debt, or is bound to account for advancements equal to his part of the estate, both real and personal, and that this has priority over the claim of his creditors.

The attachment was levied upon the interest of the said Daniel H., in a tract of land and sundry slaves.

The Chancellor finds the debt of complainant to be \$666.66, and enters a judgment for that amount against Daniel H. He also finds, and the proof shows, that, on the 12th of August, 1856, the intestate, then being endorser for his son, Daniel H., in the Branch Bank of Tennessee, at Athens, on a note previously discounted, which, with interest, then amounted to \$818.32, took up said note, and gave his own note and endorsers for the same; and after several renewals and payments in his lifetime, the same was paid off by his administrator in February, 1858, out of the assets of the estate. It is stated in the answer that this was regarded by John Hoyle as an advancement to his son, and it is insisted that it shall be so considered. But on this point there is no proof; yet it is certain that he paid that amount to or for his said son, and took from him no obligation of any kind for it. Nor does it appear that he ever claimed or demanded it from him as a debt. Then, whether it shall be considered an advancement or debt, is left to the legal presumption in such a case. We held at Nashville, last term, in the case of *Vaden v. Vaden*, 1 Head, 300, that where a father advances money to a son, or pays debts for him, the law presumes it is an advancement, unless it is shown by proof, or circumstances, that it was intended to be held as a debt against the son. Such we consider to be the law, and consequently must regard this as an advancement. There can be no doubt, if that be so, that it must be accounted for before Daniel H., or any one claiming through or under him, can claim any interest in the estate, either real or personal. Advancements must be brought into contribution, since the act of 1829, ch. 36, whether of realty or personalty. The Chancellor gave priority to this as a debt due the estate, and we will not say that he was incorrect in that, but do not pass upon that question now, as the

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ground on which we place it, is clear and unquestionable, and brings us to the same conclusion; that is, that the amount paid for Daniel H., must be accounted for before the complainant can reach any part of the estate. It is supposed that there will be nothing left for creditors; but if it be desired, the account may be taken as ordered by the Chancellor.

An attempt is made in the proof to impeach the complainant's claims, upon the ground that the notes of which he is the assignee, and upon which this suit is brought, were given for a new invention, patented, which is worthless, and are therefore without consideration. But perhaps the proof is insufficient for that purpose, and he has successfully established his claim against the said Daniel H.

The decree is therefore affirmed upon the ground, and for the reasons stated above; and if it is desired by the complainant, the case will be remanded for the account, and such further proceedings as may be necessary, in the Court below.

HENRY M. MYERS AND WIFE v. F. A. ROSS *et al.*

1. **REGISTRATION.** *Deed of trust. Subsequent purchaser. Notice of prior incumbrance.* Act of 1831, ch. 90, § 6. A deed of conveyance, bill of sale, or other instrument takes effect from the time it is registered. And any deed of conveyance, bill of sale, or other instrument which is last executed, but first registered, shall have priority, unless the subsequent purchaser had full notice of the previous conveyance. The provisions of the act of 1831 include deeds of trust.
2. **SAME.** *Same. Same. Notice to agent or trustee.* If the agent or trustee has notice of the *prior* incumbrance or conveyance, it is notice to the principal. Thus, if a subsequent conveyance is made to trustees who have notice of a prior incumbrance; or if a person purchase with notice of a prior conveyance, and agree that another may take his purchase, the latter not having notice of the previous conveyance, the first purchaser is the agent of such sub-purchaser, *ab initio*, and he is affected with notice.

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3. *SAME. Same. Same. Case in judgment.* R. executed to M. a deed of trust, to secure a debt due to M. He subsequently executed a deed of trust to N. and I., as trustees, for the benefit of the bank. N. was the counsel of the bank, and I. a bank director. N. and I. had notice of the existence of the prior deed to M. Held, that although the subsequent deed to N. and I. was registered first, the deed to M. was entitled to priority, and should be first satisfied.

FROM HAWKINS.

This cause was heard at the May Term, 1859. Chancellor LUCKY pronounced a decree against the complainants. They appealed to this Court.

HALL, L. C. & M. T. HAYNES, for the complainants.

NELSON, NETHERLAND & HEISKELL, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

Frederick A. Ross, on the 2d of November, 1849, executed a deed of trust to complainant, Henry M. Myers, upon certain real estate in Hawkins county, to secure to Caroline Myers, wife of said Henry M., the sum of \$2100, which said Ross owed her. This deed, though acknowledged before the clerk, on the 1st of January, 1850, was not registered until the 2d of March, 1852.

Subsequent to the execution and acknowledgment of said deed, and before its registration, the said Frederick A. Ross, who wished to procure a loan from the Branch Bank of Tennessee at Rogersville, as well as to make more secure certain debts which he owed said Branch Bank, executed another deed of trust, to secure the payment of said advances and debts, in which he conveyed to John Netherland and Charles J. McKinney, as trustees for that purpose, certain lands also situated in Hawkins county, and which included the real

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estate previously conveyed to Henry M. Myers, as above stated.

This deed to Netherland and McKinney was proved and registered before the registration of the deed to Myers; and the question now is, which of these deeds shall have priority of payment out of the property common to both?

It is insisted that the bank had notice of the deed to Henry M. Myers, and that this entitles complainant, Caroline, to priority of satisfaction over the deed for the benefit of the bank, though the latter deed was first registered.

The evidence as to the notice rests upon the testimony of said Ross, who proves that before the writing of the deed for the benefit of the bank, he mentioned to John Netherland, in a casual, momentary remark in his house, the fact that he had given to H. M. Myers a deed for a very small part of the property he intended to convey to the bank, but believed he could adjust that matter in a short time; that Mr. Netherland was counsel for the bank; that on the night of that day the witness attended in the bank, and then and there the papers were written for the bank by T. A. R. Nelson; that there were bank officers present, not distinctly remembered by the witness—only he felt certain that neither Mr. Netherland nor C. J. McKinney were there; that the next morning, and before the deed to the bank was witnessed, he met C. J. McKinney, a bank director, in the street, near his store, and while passing, stopped for a moment, and said to him just what he had mentioned to Mr. Netherland.

The act of 1831, ch. 90, after enumerating what instruments shall be proved and registered, declares in the sixth section thereof, that "any of said instruments, so proved and registered as aforesaid, shall take effect only from the time they are registered, and any deed of conveyance, bill of sale, or other instruments above mentioned, which shall be last executed, but first registered, shall have preference thereof, unless it is proved in a Court of Equity, according to the rules of said Court, that such subsequent purchaser had full notice of the previous conveyance."

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In *Knowles v. Masterson et als.*, and *Vance v. Masterson et als.*, 3 Hum., 619, it was held that mortgagees were within the meaning of this section of the act of 1831. And it is most obvious, not only from the principle of that case, but from the language of the act itself, that it embraces deeds of trust.

It was also further determined in that case, that knowledge of a prior incumbrance, on the part of a subsequent purchaser, though his deed might be first registered, had the effect to postpone him as against such previous incumbrancer.

The question now is, whether the notice thus communicated by F. A. Ross of the existence of the deed to Myers, to John Netherland and Charles J. McKinney, was notice to the bank? And we are of opinion it was. They were the trustees in the deed for the benefit of the bank, and as such, took the legal title to the estate. It is most manifest that the communication was made to them in relation to the very deed then about to be executed for the benefit of the bank, and in which they were to, and did become the trustees; and we think both had the notice prior to the execution of the deed. But this is not material, since notice to one was as effective as to both. They, no doubt, believed at the time, as did Ross himself, that he could, in a short time, adjust the debt with Myers; but this cannot impair the legal effect of the notice. It is difficult to perceive how the beneficiary in a deed of trust can claim the advantage of its provisions without being affected with a notice to the trustees of a prior incumbrance.

In *Lefevre v. Lefevre*, (Amb., 436, S. C., 3 Atk., 646,) Lord Chancellor Hardwicke held, that notice to an agent or trustee was notice to the principal. In that case lands in a register county were settled on trustees by a deed which was not registered, and the same lands were afterwards, upon a second marriage, settled on two trustees, Dandridge and Norton, the latter of whom was the solicitor of Mary Lefevre, the beneficiary in the second deed, and had notice of the former settlement; and the decision of the Chancellor was, that though the second settlement was registered pursuant to the statute 7th Anne, in both respects, as agent and trustee, notice

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to Norton was notice to defendant, Mary, the beneficiary, likewise. The Chancellor, in the opinion, cites the case of *Jennings v. Moore, Blincorne and others*, 2 Vern., 609, which was this: Blincorne having notice of an incumbrance, purchases in the name of Moore, and then agrees that Moore shall be the purchaser, and he accordingly pays the purchase money without notice of the incumbrance. Though Moore did not employ Blincorne, nor know anything of the purchase till after it was made, yet Moore approving of it afterwards, made Blincorne his agent *ab initio*, and therefore shall be affected with the notice to Blincorne. See also *Union Bank v. Campbell*, 4 Hum., 394.

The decree of the Chancellor, as to the equities of the parties under these two deeds of trust will be reversed, and priority given to complainants.

THE EAST TENNESSEE AND VIRGINIA RAILROAD COMPANY v.
DILLARD LOVE AND WIFE.

1. RAILROAD COMPANY. *Eminent domain. When owner under disability. Title, how divested. Jurisdiction.* The right of Eminent Domain is not restricted by any disability of the owner of the land appropriated. When, therefore, the State authorizes the appropriation of private property for the public good, the consent of the owner is not necessary; there is no power of resistance. The owner has the right, alone, to demand, in the mode pointed out by law, the compensation secured by the Constitution. Hence, if a corporation, under the authority of their charter, appropriate the land of a *feme covert* by locating a railroad thereon, and she and her husband petition for compensation and damages, the Court has the power to divest them of their title to the land taken, and vest the *fee* in the company, or order a deed to be made by the husband and wife, with the necessary formalities, as a condition precedent, to the receiving of the compensation and damages allowed.

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2. **SAME. Same. Same. How the fund to be disposed of. Husband and wife.** In such a case the wife is entitled to the compensation and damages allowed; and it is the duty of the Court to protect her right thereto, by seeing that the money is paid to, or upon legal authority from her.
3. **SAME. Applicants for compensation must show title. Partition. Estoppel.** To entitle applicants to compensation for land appropriated by a railroad company, they must show title in themselves. But, if tenants in common make a joint application, by petition, in which they allege that partition has been made, they would be *estopped* from afterwards denying said partition, so as to interfere with the title of the company; and it would be unnecessary to show, by other evidence, that the land had been divided, as alleged.
4. **SAME. Same. Rule as to benefits and damages.** The rule established in the case of *Woodfolk v. Nashville and Chattanooga Railroad Company*, 2 Swan, 422, is reviewed and approved.

FROM WASHINGTON.

This cause was heard before Judge PATTERSON, upon an appeal from the report of the Commissioners. Said report was affirmed, and the defendant appealed.

MAXWELL, MILLIGAN and L. C. HAYNES, for the plaintiff in error.

NELSON, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

The East Tennessee and Virginia Railroad Company located its road upon the land of Mrs. Love, in Washington county. The petition was filed by Love and wife, to obtain compensation and damages in the mode provided by the charter, in October, 1856, in the Circuit Court of Washington. The defendant appealed from the action of the commissioners, and the case was submitted to a jury, and tried before the Court in conformity to the statute. The jury reduced the amount

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assessed by the commissioners, both as to the value of the land appropriated, and the incidental damages. For this reduced amount, judgment was rendered by the Court, and an appeal in error, taken by the defendant. Various errors are assigned in argument.

1. It is insisted, that as the title to the land is in Mrs. Love, a *feme covert*, the corporation will not get a good title, because, by simply using her name with that of her husband, as petitioner, without more, she will not be divested of her right, and, consequently, as the road is, by the charter, entitled to the fee simple in the land taken, upon payment of the compensation and damages assessed, the Court cannot compel it to make payment until it is shown that a perfect title can be made.

But we think the corporation will obtain a good title under the proceedings in this case. This could either be decreed by the Court, which has, perhaps, been the usual practice, or the Court could order a deed to be made by husband and wife, with privy examination, (if indeed any paper title at all is necessary,) as a condition precedent to the payment of the damages. The right to take land under the power of Eminent Domain, is not restricted by any disabilities of the owner. *That* would defeat the object of the power, which is, the public necessity to take it for the general good. The power of the State to appropriate the property is unquestioned, but the right of the owner to be paid for it, is secured by the Constitution. The power of the State is subject to no restrictions but that of making compensation. This inherent authority of the government to take private property for public use, is exercised without any reference to the private ownership. The existence of infancy, coverture, or other disability, presents no obstacle. The correlative constitutional right to demand and receive the value of the property, can only be asserted by the true owner. Where the land belongs to a *feme covert*, *she* is entitled to the price when the property is taken from her, otherwise than by her free and voluntary consent in the mode pointed out by statute on a sale by her husband. In

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that case there must be a privy examination before the proper authority to divest her of her title. Their joint action is necessary in every case, either upon a private sale, where a deed is made in pursuance of a contract of the husband, or where she is deprived of her property by the decree of a Court, or the State in the exercise of her paramount authority for the public good. Here she has been deprived of her property without her consent, but lawfully. A claim against the public, or the corporation exercising the public right, for the value of the land taken, results; and how is it to be asserted? The statute incorporating the company prescribes the mode, and it is to be by petition to the Circuit Court, &c. In this suit, as it may be called, for a debt of the wife the husband must join. In a suit for a demand of the wife, the husband may, certainly, bring her before the Court for her own benefit, so as to bind her by the action of the Court, without any express consent, or privy examination of the wife. The object and effect of the suit is not to deprive her of her land, for that is gone already by the lawful act of the corporation; but it is to recover the pay for it, a debt due the wife. All the corporation can require is, that it may get a good acquittance when the money is paid, so as not to be subject to a demand from any other person. We think the joint petition of husband and wife, in this case, brings her before the Court in a form to extinguish her claim by payment of the judgment, and on the other hand, to authorize the Court to effectually pass her title to the company by decree, or to order a joint deed, to be made by the petitioners in due form, before they receive the money. But we hold further, that the *wife* is entitled to the money, as the land was hers, and that the Court must protect her rights. Although the provisions in the Code in relation to the proceeds of land sold belonging to persons under disability, may not expressly embrace this case, yet the sections on pages 616 and 619 are broad enough to cover it, and the Court should be governed by them in the disposition of this fund. The fallacy of the argument on this part of the case, arises from the apparent

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idea which pervades it, that the consent of the *feme covert* must, in some way, appear, to part with her land. But the doctrine is just the reverse. The sovereign authority demands her property for the public good, and she has no power of resistance, but must passively submit. Her property is irrecoverably gone, but a right to the value, in money, remains. So the question is not what is necessary to deprive her of her land, that is already gone by the location of the road upon it, but how shall she recover the compensation to which she is entitled? We think the proper mode was adopted in this case, and the objections taken by the defendant are not sustainable.

2. It is objected that the title of Mrs. Love to the land is not established. It is certainly true, that the compensation and damages cannot be recovered by any other than the true owner of the land taken. The only title paper produced, is the will of Joseph Young, the father of Mrs. Love. By that, the tract of land over which the road runs, was devised to his daughter Peggy (Mrs. Love,) and Elizabeth (Mrs. Burts) "equally to be divided between them." The partition between the devisees was allowed to be proved by parol. It is true, that partition to be valid, must be in writing. But Burts, originally, and his wife, by amendment, are united in this proceeding, claiming damages for the land taken from them out of their part of the same land, on the other side of the partition line, agreed upon and recognized for more than twenty years. Their own statements of record would conclude them as to their respective rights, and protect the company from any further or future claim by either. The title to the two is undisputed, and their own statements as to the proportions of each in the compensation, would be binding upon them.

3. The supposed error most seriously pressed in the argument, is upon the instruction of the Court to the commissioners, and the jury, on the question of incidental damages and benefits under the provisions of the charter on that subject. This is a subject of great difficulty, and was much considered by the Court in the case of *Woodfolk v. The Nashville and*

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Chattanooga Railroad Company, 2 Swan, 422. Without going again into the question, it is enough to say here, that upon a review of that case, we are satisfied with its doctrines, and the principles it establishes. We are not able to see in the instructions of the Court in this case, any substantial departure from that. No objection is taken to the charge of his Honor, in relation to incidental injuries to the land owner, but the error is supposed to exist on the question of the incidental benefits authorized by the charter to be set off against the damages. Upon this point it is only necessary to state, that we do not see that discrepancy between the charge, and the case referred to, which is insisted upon by the counsel, but consider that a strict, or at least substantial, conformity exists. The reasons which brought us to the conclusions announced in that case, need not now be repeated, as they are there fully set forth. The question is an important one, and is pregnant with inherent difficulties, but we consider it unnecessary again to open it, as the rules laid down in the case referred to have ever since been adhered to by this Court, and are considered correct.

Our conclusion is, that there is no error in the case, and we therefore affirm the judgment. The case will, however, be remanded, that the course indicated in this opinion be adopted by the Circuit Court for the security of the married women, (both Mrs. Love and Mrs. Burts,) to the compensation and damages recovered.

As to the costs, we think they were properly charged to the defendant, and the cost of this Court must also be so taxed.

JAMES E. WEBB AND WIFE v. SARAH WEBB *et al.*

DESCENT AND DISTRIBUTION. *As to illegitimates. Intestacy. Act of 1851-2, ch. 39. Code, § 2428. If an illegitimate person die intestate, his or her estate, both real and personal, goes, first, to his or her child*

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or children, if any there be; and if none, then, to the husband or wife, as the case may be, if a husband or wife survive; and if not, then to the mother, if she is living; and if the mother is not living, then, to the brothers and sisters, by the mother, or their descendants.

FROM SULLIVAN.

The bill was dismissed, upon demurrer, by Chancellor LUCKY. The complainants appealed.

M. T. HAYNES, for the complainants.

SAMUEL POWELL, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant's bill, which was dismissed on demurrer, presents this case: L. H. Webb died intestate, in Sullivan county, on the 8th of June, 1858, possessed of property, both real and personal. He was of *illegitimate* birth—the child of complainant, Elizabeth Webb, who afterwards intermarried with the complainant, James E. Webb, by whom she had several children born in wedlock, who are made defendants to the bill. The intestate left a widow surviving him, who is also a defendant, but, no child. The question is—who succeeds to his estate?

For the complainants, it is argued, that the estate goes either to the mother, or to the legitimate brothers, of the intestate. On the other side, it is insisted that it goes to his widow; and so we think.

Some confusion was produced in the argument, in consequence of not discriminating between the rules applicable, in cases of intestacy, to persons of legitimate birth, and illegitimates.

The general laws of descent, it must be remembered, do not, in general, apply to illegitimates, unless embraced in terms, or by necessary implication.

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The rule governing this case, in our judgment, is found in the act of 1851-2, ch. 39, which has been incorporated into the Code, sec. 2423. It is as follows: "When an illegitimate child dies intestate, without child or children, husband or wife, his real and personal estate shall go to his mother; and if there be no mother living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters." And it may be remarked, that the rules of descent prescribed in the preceding sections of this article of the Code, are applicable to the estates of persons of legitimate birth, dying intestate.

Under the section of the Code just cited, it results, by necessary implication, that the mother cannot take, except in the event of the intestate's dying without either "child or children, husband or wife." The course of descent, in such case, contemplated by this section, is, that the estate shall go, first, to the child or children of the illegitimate, if any there be; and if none, then to the surviving husband or wife, as the case may be, if husband or wife survives; and if not, then to the mother; and if the mother be not living, then to his brothers or sisters by his mother, or their descendants.

Decree affirmed.

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JAMES EVANS v. WILLIAM SHIELDS *et al.*

1. **ROADS. Appeal. Final judgment.** An appeal will not lie, except from a final judgment. Upon the return of the report of a jury of view, to which exceptions were filed, the County Court disallowed the exceptions, and "confirmed said report in all things, except that part assessing the damages, which question of damages the Court *left open*." No judgment was rendered, upon the confirmation of the report, establishing the road. Held, that this is not a final judgment in the County Court from which an appeal will lie.

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2. **SAME. Parties.** In all contests about roads, the Justices, on the one side, and the party injured or aggrieved in the premises, on the other, are the proper and necessary parties. The County Court cannot devolve the power and trust confided in it, on behalf of the public, to a private and irresponsible individual; and thus in effect, leave the important matter of the establishment and regulation of the public roads of the county, to be controlled by the interests, prejudices, or resentments of private individuals.
3. **SAME. Jurisdiction. Trial by jury.** The jurisdiction of the roads and other matters of county police, is conferred by statute exclusively upon the County Court; and the Court has no power to refer the determination of facts to a jury. The jurisdiction of the Circuit Court is merely appellate, and the County Court having no power to submit issues of fact to a jury, it cannot be done by the Circuit Court.
4. **SAME. Judgment for costs.** In contests about roads, if private individuals are the parties to the record, no judgment for costs can be rendered, for want of the proper parties. Witnesses and officers of the Court, in such cases, are left to their remedies at law against those by whom they were summoned, or for whom they may have rendered service.

FROM GREENE.

This cause was tried before PATTERSON, Judge, and a jury. Judgment for the plaintiff. The defendant appealed.

HAWKINS, for the plaintiff in error.

NELSON & CRAWFORD, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

This case seems to have been treated as if it were a controversy between the parties about a matter of private right. Such is not the case. It is a contest about the establishment of a public road, to which the Justices of the County Court of Greene—who are, under our law, the proper representatives of the public in this matter—ought to have been the parties on the one side, and the plaintiff in error here, Evans—who im-

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pugns the action of said Justices, in regard to the establishment of said road—the party on the other side.

It appears that, at the January session, 1857, of the County Court of Greene, William Shields, together with several other citizens of said county, presented a petition to said Court, asking the appointment of a jury of view to lay off a third class road, therein specifically described. It was also asked in the petition, that the jury should assess such damages as any owner of land might, in their opinion, sustain by reason of said road running through his land.

The prayer of the petition was granted, and a jury was appointed accordingly. The jury made their report in substantial conformity with the petition; and assessed the damages of Evans—through whose field the road was laid off—at *two dollars*. Before confirmation of said report, Evans applied to be made a defendant to the proceeding, which was allowed; and, thereupon, he filed exceptions to the report, and offered proof impeaching the same. The Court disallowed the exceptions, and “confirmed said report in all things, except that part assessing the damages of two dollars to James Evans; which question of damages the Court *left open* ;” and adjudged that Evans should pay all the costs of the case. Thereupon, Evans prayed an appeal to the Circuit Court, which was granted.

In the Circuit Court the case was docketed, and prosecuted throughout, in the names of “William Shields and others, plaintiffs, and James Evans, defendant.” They were likewise regarded as the real parties in the County Court, and the bond for the prosecution of the appeal from the County to the Circuit Court, was taken payable to Shields; as was, also, the bond for the appeal in error to this Court.

At the first term of the Circuit Court after the appeal, a motion was made on behalf of the so-called plaintiffs, to dismiss the same, on the ground that no such final judgment had been rendered in the case, by the County Court, as could be appealed from. This motion was refused. And, thereupon, the Judge, then presiding, directed that issues of fact should

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be submitted to a jury, to inquire and determine, first, whether the road, as laid off, was of public utility; second, whether it had been laid off in the most convenient place; and third, what damages Evans would sustain.

On the trial of these issues, a great number of witnesses were introduced on both sides. The jury responded affirmatively to the two first issues; and upon the third, they assessed the damages at fifteen dollars. Upon this finding of the jury, the Court adjudged, that the judgment of the County Court, confirming the report of the jury, be affirmed; and that the case be remanded to the County Court, to the end that said road be established according to law; and rendered judgment against Evans for the costs. But the Court declined to render any judgment in favor of Evans for the damages found by the jury, on the ground that the issue, upon that point, was an immaterial one. From this judgment, an appeal in error was prosecuted to this Court.

The entire proceedings in this case, from the return of the report of the jury into the County Court, are without precedent, so far as we are aware; and, in our judgment, are irregular and erroneous.

The judgment of the County Court, upon the report of the jury, was imperfect, and not such a final judgment as an appeal would lie from. The case, so far as the matter of damages is concerned, was left in the County Court undisposed of; and so far as the report was confirmed, there was no judgment establishing the road. The motion made in the Circuit Court, to dismiss the appeal, was, therefore, proper, and should have been allowed.

But the proceedings are irregular for want of the proper parties. Shields is no party to the record, by reason of the fact of his having presented the petition; and even if it would have been allowable to have made him a party, instead of the Justices of the County Court, it is enough to say, that no such thing was done. But it is impossible to maintain, as it seems to us, that it would be competent to the Justices of the County

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Court to devolve the power and trust confided to them, on behalf of the public, to a private and irresponsible individual, and thus, in effect, leave the important matter of the establishment and regulation of the public roads of the county to be controlled by the interests, prejudices, or resentments of private individuals. This cannot be tolerated. As before stated, the proper and necessary parties in all such cases, are the Justices, on the one side, and the party "interested or aggrieved in the premises," on the other.

On this ground, the proceeding ought to have been either dismissed, or an amendment made bringing before the Court the proper parties.

Again: We are aware of no power in the Circuit Judge, in such cases, to submit issues of fact to a jury. The jurisdiction of the roads, and other matters of county police, is conferred by statute upon the County Courts, exclusively. The jurisdiction of the Circuit Court, in such cases, is merely appellate. If, therefore, the County Court had no power to have referred the determination of the facts to a jury, it would be difficult to maintain that the Circuit Court, on appeal, being possessed of no greater power, in the given case, would be authorized to do so. But even if such an inherent power were admitted to exist in the Circuit Court, we think its exercise would be inexpedient, and ought not to be sanctioned. If the responsibilities of this most important jurisdiction are to be, at pleasure, transferred from the Courts to juries, we will soon find the community involved in scenes of litigation and strife, alike intolerable and ruinous.

These difficulties seem to have been felt by the Judge who presided on the trial of the case, but he felt himself embarrassed and committed, by the previous action of a different Judge.

The result is, that the judgments of both the Circuit and County Courts must be reversed, including the order of the County Court confirming, in part, the report of the jury of view; and the case will be remanded to the County Court,

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for proper proceedings, and judgment upon said report of the jury.

As regards the costs which have accrued since the return of the report of the jury of view, as well in this Court as in the Circuit and County Courts, no judgment can be rendered for want of the proper parties; and the result is, that witnesses, and the officers of Court, must be left to seek redress from the parties by whom they were respectively summoned, or for whom they may have rendered service, so far as said parties may be liable by law.

Judgment reversed.

JAMES H. PECK, TRUSTEE, &c. v. JAMES JAMES, TRUSTEE, &c.

1. **PUBLIC AGENTS.** *Measure of fiduciary responsibility.* The measure of fiduciary responsibility, in the view of a Court of Chancery, is the same, whether arising from public or private relations; and, in the absence of *bad faith*, the same fair and equitable principles of adjustment which govern the subject of agency in general, will be applied to, and regulate the accountability of public agents.
2. **SAME.** *Same. Liability of county trustee.* If the county trustee, *bona fide*, receive bank paper in the discharge of his official duty, that is current and good when received; but depreciates in value, or becomes worthless before paid out, he is not liable for the same. The loss falls on the State, or county, and not on him.
3. **SAME.** *Same. How to discharge himself. Evidence. Practice.* In order to discharge himself in such a case, it is incumbent on the trustee to show that he was vigilant in his trust to prevent the loss. He must also prove, otherwise than by his own statements in his bill, that the notes for which he claims a credit, are the same received by him in his capacity as trustee. The Courts should require, by a reference to the master, or otherwise, proof to be made of the identity of the

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fund, and that the public agent has been guilty of no want of vigilance in endeavoring to secure it, and has used every reasonable means to save the public from loss.

FROM GRAINGER.

This cause was tried before Chancellor LUCKY, upon the bill and an order *pro confesso*. No proof was taken in the case. The Chancellor decreed for the complainant, and the defendant appealed.

THORNBURG, MCFARLAND, and SHIELDS, for the complainant.

REESE, FLETCHER, and McCONNELL, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

JAMES JAMES, as present trustee of Grainger county, moved against James H. Peck, his predecessor, for the balance of the common school money remaining in his hands.

This bill was filed by Peck, claiming a right to be exonerated from liability for so much of the amount reported against him, as consists of bank notes which have become valueless since he received them, except so far as to pay over to his successor the identical bank notes received; and he prays that his successor be compelled to accept them in discharge of their nominal amount.

The case made by the bill is: that upon the warrant of the Comptroller for the common school fund due to the county of Grainger, for the year 1856, the Branch of the Bank of Tennessee, at Rogersville, paid over to him twelve or fourteen hundred dollars upon the "Bank of East Tennessee," which was then believed by him to be good and solvent, and its bills were everywhere current and bankable; that he notified the common school commissioners of his county, that he had the money, and paid it out to them according to law, as fast as

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they applied for it, and was guilty of no neglect, or delay, in appropriating and paying it out as directed by the law; that while thus engaged in discharging the duties incumbent on him, by the statutes regulating the common school fund, the bank failed, when he still had in his hands \$680 of the said notes, which are now worthless. The prayer is, that his successor, the defendant, be compelled to receive the said notes, and that he be allowed a credit for that amount.

The demurrer of the defendant was overruled, and he refusing to answer or make further defence, a final decree was made in pursuance of the prayer of the bill.

We think the principle settled in the case of the *Governor v. McEwen*, 5 Hum., 265, must govern this. It is held in that case, that "the measure of fiduciary responsibility, in view of a Court of Chancery will be the same, whether arising from public or private relations." And that in the absence of bad faith, the same fair and equitable principles of adjustment which govern the subject of agency in general, will be applied to and regulate the accountability of public agents. In that case McEwen as superintendent of public instruction, intrusted with the collection, custody and control of the common school fund, by the act of 1835, creating the office and fixing his duties, was allowed a credit for such circulating paper currency collected by him or his agents, which was received in good faith, then being current, but became worthless or depreciated by subsequent events. It would seem to be a hard rule upon the public agents, or trustees, to make them accountable for the failure of the banks, whose notes they may have received at a time when such banks had good credit, and their notes circulating in all the channels of business and commerce, at par, with specie, and in fact then convertible into specie. If this were so, no one would hold such offices, or they would be driven to the inconvenient necessity of receiving nothing but gold and silver, which would be out of, and contrary to, the ordinary course of business, both public and private. In the case under consideration, and those of a similar character, where the fund was received from the financial agent of the State, the rule

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of accountability insisted upon would be particularly harsh and severe. Good men would be deterred from holding these important trusts, if such were the rules of law on the subject.

Sheriffs, and other collectors of the public revenue, are required, by statute, to receive current bank notes, whether the tax be for common school, or other purposes. These trustees, and all others, receive them in their own business; and lawyers, clerks, and other agents, both public and private, demand nothing better, in the absence of special instructions. True, in all these cases, (except the collectors of taxes,) as well as the case before us, specie may be demanded, as there is no other lawful tender. But the question is as to his accountability if he does not.

The county trustees are required to keep the funds received for the county, safely, until it is paid out by him to the district common school commissioners for the purposes intended. But this does not imply that he is to use no diligence to guard against loss by the failure of banks, or otherwise. He will be held to fidelity and diligence in his trust, as well in this as in all other respects. In order to discharge himself in such a case, it will be incumbent upon him to show that he was vigilant in his trust to prevent the loss under all circumstances; and, furthermore, to prove otherwise than by his own statements in his bill, that the notes for which he claims a credit are the same received by him in his trust.

If this is not required, the greatest frauds might be practiced by these public agents. All the bad notes in the neighborhood might be packed off upon the State. The bill is not sufficiently special on these points, and should have been answered by the defendant, upon the overruling of his demurrer, so as to have raised the proper issues of fact, and put the complainant upon the proof of his case. It is our duty to see that no injury be done to this or any other public fund, by the inattention or connivance of those who succeed to a trust, and that a case for relief is fully made out; otherwise, the rule we adopt would be subject to very great abuse. The Chancellor should have made a reference to the master for a report

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upon these material points, before a final decree. While we hold that the trustee should be relieved in the case we have stated, we think great particularity and strictness should be required by the Courts, in making out the case, to avoid impositions and frauds, and produce greater caution and care on the part of these and other public agents in the discharge of their duties. They should always be prepared to show the identity of the fund, and that they have been guilty of no want of vigilance in endeavoring to secure it, and by every reasonable means to save the public from loss. The notes should also be brought into Court with the bill, or upon an order, to be identified with reasonable certainty, and subject to its control. We are not to be understood as prescribing different rules of evidence in these cases from others, but only to require that the complainant shall make out his case to the full satisfaction of the Court, and that the Court shall see that the case is fully and fairly defended. We are not to be understood, either, as intimating that we see any thing in this case to excite suspicion, but our remarks are intended to be general, for the promotion of the ends of justice, and the protection of this favored fund.

The State should have been made a party defendant, and that may be done by amendment when the case goes back.

JOSEPH DELK v. THE STATE.

EVIDENCE. *Positive and negative.* If two witnesses are called upon to testify touching the same matter, and one swears that he saw or heard a fact, and the other, who was present, that he did not see or hear it, and both witnesses are equally credible, the affirmative witness is to be believed; but if the witnesses both swear positively—the one that

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the thing did take place, and the other that it did not—credence is due to the one who has the superior and positive knowledge of the transaction.

FROM SCOTT.

The plaintiff in error was indicted in the Circuit Court, for *obscenity*. He was tried and convicted at the February Term, 1859, GARDENEIRE, J., presiding. "The counsel for the plaintiff in error requested the Court to charge the jury that in the case before the Court, the rule of *positive* and *negative* testimony did not apply, but was a conflict in the proof: that if A, B, and C all testify to a single fact, all of whom testify that they had equal opportunities of knowing the fact, that this would not be a case in which the rule of *positive* and *negative* testimony would apply; but the jury should weigh the testimony, and determine to which they would attach most weight."

The Court refused to charge as requested, and stated to the jury upon this point: "That if two persons have equal opportunities of knowing how a given fact is, and one states it one way, and the other, if it happened he did not see or hear it, the statements are not necessarily in conflict. Whether they are in conflict, depends on the circumstances of the case. If they are not in conflict, credence is due to the witness who swears affirmatively." To this the defendant excepted, and appealed in error to this Court.

SCOTT, MYNOTT, and HUMES, for the plaintiff in error.

HEAD, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

The proof of the guilt of the plaintiff in error, in this case, is so meagre and unsatisfactory that we should be loath to permit the conviction to stand, if the instructions of the Cir-

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cuit Judge to the jury had been proper. But we do not so consider them. It is a rule that if a witness swear *positively* that he saw or heard a fact, and another who was present, that he did not see or hear it, and the witnesses are equally faithworthy, the affirmative witness is to be believed. If he testify untruly, he is guilty of perjury; but it by no means will follow that the negative witness would be perjured, although the affirmative were true. The falsity of his testimony, if it actually were false, might be attributed to inattention, mistake, or defect of memory. In short, it is a case of knowledge, and the want of it. One witness *knows*, and the other does *not*.

It is evident the Circuit Judge put the case to the jury upon this rule, and that it must have controlled their verdict. In this we think he erred. The guilt or innocence of the defendant depended entirely upon the swearing of Bluford Emory and Thos. Phillips. These witnesses, with the defendant and others, stayed all night at the house of Phillips' father. The defendant, with one Adkins and another, were lying in the same bed, and several others in the same room. The crowd were talking, and some of them were drunk. Emory stated that he heard the defendant use the obscene language charged in the presentment; knew his voice, and *thought* it was his, but might be *mistaken*; that he heard Adkins also use the language, and his voice and defendant's were somewhat alike. It does not appear whether this witness was drinking; nor does it appear what were his opportunities to have heard what was said; nor whether he was in the same room. On the other hand, the witness, Phillips, states that he was in the same room; was sober, and paid particular attention to what was said—the crowd being at the house of his father, and he being in the belief that they were acting badly; that he heard the words charged in the presentment, and they *were used by Adkins and not the defendant*; he knew very well and could tell the voice of both. Now, it is plain here that Phillips is the more positive witness of the two—and that he was entitled to the superior credit; and yet, under the charge of the Circuit Judge, his evidence must have been discarded by the

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jury. The testimony of these witnesses might very well have been reconciled, consistent with the innocence of the defendant, upon the supposition that Emory was mistaken, and that the *superior and positive* knowledge of Phillips entitled him to higher credence; and the facts of the case should have been submitted to the jury under this view of the law.

Reverse the judgment and remand the case.

DAVID KUHN v. FRANCIS FEISER.

1. **FORCIBLE ENTRY AND DETAINER.** *Trustee. Possession.* The action of forcible or unlawful entry and detainer, will not lie in favor of a trustee created by a mortgage, or a purchaser under him, neither of whom has had possession of the premises, against a naked trespasser. In such case there is no *privity* between the trustee, or purchaser, and the trespasser; and the latter is not the tenant of either.
2. **SAME.** *Same. Case in judgment.* A mortgage was executed, conveying a tract of land, to secure the payment of certain debts. The mortgagor remained in possession of the land until his death. After the death of the mortgagor, the trustee sold the land to pay the debts secured. After the sale, the wife removed and left the land in the hands of an agent, who leased it, and the lessee took possession. Held, that the transaction being prior to the Act of 1856, the widow had no interest in the land, and the lessee was a mere naked trespasser; and an action of unlawful detainer would not lie at the instance of the purchaser against the lessee.

FROM MORGAN.

This cause was tried in the Circuit Court of Morgan county, GARDENHIRE, J., presiding. Verdict and judgment for the defendant. The plaintiff appealed. The facts are stated in the opinion of the Court.

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HUMES, for the plaintiff.

MYNOTT, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of "forcible and unlawful entry and detainer;" and the question is, can it be supported upon the facts in this record? We think not.

On the 6th of February, 1856, F. Heydeman conveyed the lot in controversy, by deed of trust, to secure the payment of a debt of \$800, due from him to David Kuhn, sr. The debt not being paid at the time stipulated, the lot was sold by the trustee, and Kuhn became the purchaser.

After the execution of the deed of trust, but before the sale by the trustee, Heydeman died, leaving his widow in possession of said lot. Some few months after the death of her husband, the widow removed to Missouri, leaving her agent in possession of the lot, and said agent leased the lot to the defendant, Feiser. And to recover from him the possession of said lot, Kuhn, the purchaser at the trust sale, brought this action.

We assume, from the statement of the facts in the bill of exceptions, that Heydeman died intestate. Upon this assumption, the equitable title descended to the heirs; and the deed of trust having been made prior to the Act of 1856, ch. 57,—entitling the widow to be endowed of lands conveyed by mortgage or deed of trust,—the widow of the intestate had no interest in the lot. She had no power herself, therefore, to make a lease of the lot; and, of course, could confer no authority on an agent to do so.

If this be so, it necessarily follows that, in law, the defendant, Feiser, was a naked trespasser; as well against the trustee, prior to the sale, as against the plaintiff, after his purchase. There existed no color of *privity* between Feiser and the trustee, or the purchaser under him; the idea of a *tenancy*—even by implication—is positively excluded.

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In this view of the case, we are of the opinion that the remedy of forcible or unlawful entry and detainer has no application to the case.

Judgment affirmed.

JAMES PRICE v. PETER JONES.

1. **CONTRACT.** *Title retained. Possession delivered.* A contract for the sale of personal property, by which the possession is delivered to the purchaser, but the title retained in the seller until the purchase money is paid, is valid, and will be enforced. And if the purchaser dispose of the property, by sale, before the title is vested in him by payment of the purchase money, the original owner may follow it in the hands of such third person.
2. **SAME.** *Same. Same. The injured party may sue.* If a purchaser who has thus failed to perfect his title, by payment of the purchase money, sells the property to a third person, such third person may, upon application of the original owner, deliver up the property, and sue his vendor and recover damages for the injury done him.
3. **SAME.** *Same. Innocent purchaser. Caveat emptor* The payment of the purchase money by the second purchaser, does not place him in the attitude of an innocent purchaser without notice. It is a question of right, and not one of notice. The maxim, *caveat emptor* applies; and if the person from whom the purchase is made has no title, his vendee can acquire none. The fact that the first purchaser was in possession of the property does not change the principle.
4. **SAME.** *Same. Evidence. Admissions of a party to the contract.* The declarations of the parties to a contract, made at a time when they are the only parties in interest, is competent evidence. And such evidence is admissible on trials between third persons when the terms of such contract become material.
5. **NEW TRIAL.** *Surprise. Practice.* The affidavit of a party, stating that he was taken by surprise, by the testimony of a material witness, whose statements he can disprove, unsupported by the affidavit of the witness by whom he can disprove them, is not sufficient to authorize

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the granting of a new trial. The affidavit of the person possessing the knowledge, or, at least, the affidavit of some disinterested individual to whom the information was communicated, should be produced.

FROM HAWKINS.

In the summer of 1856, Grigsby, as the agent of a company, sold a safe to Winstead, upon condition that the title was to remain in the company until the purchase money was paid. The safe was delivered to Winstead, who afterwards sold it to one Willis. Willis sold the safe to Price, and Price sold it to Jones. Jones paid Price the purchase money. Winstead failed to pay the company for the safe; and Grigsby, as their agent, demanded it from Jones, who yielded to the superior title. Jones then purchased the safe of Grigsby, the agent, and sued Price for damages. The cause was heard before PATTERSON, Judge. On the trial the Court permitted the declarations of Winstead, as to the terms of the contract between him and the company, made while he had the safe in possession, to go to the jury as evidence. There was a verdict and judgment for Jones. Price moved for a new trial; and, in support of said motion, presented his affidavit, in which he stated that he was taken by surprise by the testimony of Grigsby, and that he could disprove his statements. His affidavit was unsupported by the affidavit of any other person. The Court refused to grant a new trial, and the defendant appealed.

R. ARNOLD, for the plaintiff in error.

HALL, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

It appears, in this case, that Price sold Jones a safe, the title to which failed, and the latter sued the former for dam-

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ages in consequence of such failure, and had verdict and judgment in his favor, from which Price has appealed in error to this Court.

The facts of the case are these: One Grigsby, as the agent of a company to whom the safe belonged, sold and delivered it to Winstead upon a credit of one year; but the title was not to pass to him, but was to remain in the company until he paid for it; and if he failed to do so, the trade was to be at an end. While thus in his possession, he sold it to one Willis, in payment of an antecedent debt, and Willis sold it to the defendant, Price, who sold it to the plaintiff, Jones, as before stated.

Winstead having failed to pay Grigsby for the safe, he, as the agent of the company, demanded it of Jones, who yielded to their superior title, and again purchased the safe of Grigsby, and paid him for it.

Upon these facts the Circuit Judge did not err in instructing the jury that Winstead had acquired no title to the safe, and could communicate none to Willis, or a purchaser under him. Even if Willis had so paid the purchase money as to be enabled to claim the position of an innocent purchaser, without notice, still that doctrine can have no application here. The contest was a question of right, and not of notice. The maxim, *caveat emptor* applied; and, of course, if the person from whom the purchase is made have not the legal title, the purchaser can acquire none. It can make no difference that Winstead was in possession of the safe. The cases of *Bradshaw v. Thomas*, 7 Yer., 497, and *Gambling v. Read*, Meigs' Rep., 281, furnish direct authority upon this question.

It is next insisted that the Circuit Judge erred in permitting the declarations of Winstead to be proved and go to the jury. But in this also we are satisfied he did not err. These declarations—if we understand aright those to which the objection refers—consisted of what Winstead said, as to the terms of the trade between him and Grigsby, to the witness, Huntsman, in whose care the safe had been left, when he came to get it. They were made at a time when the company and

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Winstead were the only parties in interest, and previous to the sale made by him to Willis, and, upon well settled principles, were admissible in evidence. 1 Greenl. Ev., secs. 180, 189, 190. Nor do we think the Circuit Judge erred in refusing to grant a new trial upon the affidavit of Price, the plaintiff in error, that he was taken by surprise in the admission of Grigsby's evidence, and that, upon a second trial, he can prove the same untrue; because, passing by the inquiry as to whether, upon the facts disclosed in this record, the party has any legal ground to say he was surprised; and without inquiring whether it is probable, if Grigsby's testimony were overthrown, the result would be different. It is sufficient that Price does not produce the affidavit of any witness, contradicting the statement of Grigsby, or offer any reason for not doing so; but rests the application upon his own affidavit. In *Scott v. Wilson*, (Cooke's Rep., 315,) Judge Overton, in delivering the opinion of the Court, says: "On a motion for a new trial, on any ground, resting on the information of others, the mover's own affidavit alone cannot be sufficient. The affidavit of the person possessing the knowledge, or, at least, the affidavit of some disinterested individual, to whom the information was communicated, should be produced."

The action of the Circuit Court is also sustained by *Riley v. The State*, 9 Hum., 646.

Upon the whole, we see no error in this judgment, and affirm it.

MILTON W. BEELER AND WIFE v. EZEKIEL H. DUNN.

1. JURISDICTION. *Foreign administrators and executors. Settlement.* The Courts of Tennessee have no jurisdiction over foreign administrators and executors in their fiduciary capacity, and cannot call them to an account and settlement.

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2. *SAME. Same. May be compelled to account as trustees.* But if a foreign executor or administrator come within the jurisdiction of our Courts, and bring with him the funds or property of the estate, he may be held to account for the same as trustee for those entitled thereto.
3. *GUARDIAN AND WARD. Guardian has no power to trench upon principal. Chancery jurisdiction.* If the interest on the fund in the hands of a guardian is not sufficient to afford the means of a competent maintenance and education of his ward, a court of Chancery can authorize him to *trench* upon the principal; but the guardian has no authority to do this unless thus empowered.
4. *SAME. Question reserved.* Will the acts of a guardian or trustee, which clearly appear to be for the interest of the ward, or which are such as the Court would have authorized, be approved and protected by the Court?

FROM POLK.

The bill was dismissed by Chancellor VAN DYKE, and the complainants appealed.

TEWEHITT and HOYLE, for the complainants.

GAUT and COOKE, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

The complainant, Mary Beeler, is the daughter of William A. Cameron, who died in Forsyth county, Georgia; of which State he was a resident in February, 1839. Administration, with the will annexed, on the estate of said Cameron, was granted to the defendant by the Court of Ordinary of said county of Forsyth, in May, 1840. The testator left a widow and two infant daughters of tender age—the complainant Mary, and a sister who is not a party to this suit. The defendant, near the time of his appointment as administrator, intermarried with the widow. In March, 1846, he removed with his family to Polk county, in this State, where he has since resided. After his removal here, he was appointed guardian of

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said two minor children, by the County Court of Polk. The interest of said minors under the will of the testator, is represented by the defendant to have been about one thousand dollars each. And by a final settlement, made in the Court of Ordinary of Forsyth county, in March, 1846, the share of each was reduced to \$554 62½; and with this amount defendant was charged, as guardian of complainant, upon his appointment in Polk county.

Complainant intermarried with Beeler in November, 1856. This bill was filed in May, 1858. The complainants charge defendant with various acts of mal-administration; they seek to surcharge and falsify the accounts and settlements of defendant, both as administrator and guardian, and pray that he may account for the entire estate as administrator; and also as guardian.

No exception seems to have been taken to the jurisdiction of the Court to grant the relief to the full extent prayed for. In his answer, the defendant denies the charges of mal-administration; sets up, and relies upon the settlement of his administration accounts in the Court of Ordinary of Georgia, and his discharge as administrator, granted by said Court; he, in like manner, relies upon his settlements as guardian, with the Clerk of the County Court of Polk,—in bar of the relief sought by the bill. He substantially alleges in his answer, that the *entire fund* belonging to the complainant, Mary—both principal and interest—was properly expended by him as guardian, in her maintenance and education. The Chancellor declined to order an account; and not regarding the settlements as successfully impeached; and being of opinion that the fund in the hand of the guardian had been properly and fully accounted for by the defendant, before the commencement of this suit, dismissed the bill.

So far as the bill seeks to impeach, or to re-open, the defendant's settlement of his administration accounts, in the Court of Ordinary of Georgia, the bill was properly dismissed. It is now too firmly settled to admit of discussion, in our Courts, that a foreign executor or administrator cannot be called

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on for an account of his administration, in the Courts of this State. *Lee v. George*, 6 Hum., 61; 10 Yer., 283; 2 Hum., 224; 8 Hum., 192.

It is true, the authorities on this subject are at variance; and in some of the cases the contrary doctrine is maintained with much force. But we are not inclined to disturb a principle so long acquiesced in, and so repeatedly sanctioned by this Court.

It is equally well settled, however, that if a foreign executor or administrator come within our jurisdiction, and bring with him funds or property belonging to the trust estate, he may be held to account here, to that extent, not in the character of executor or administrator, but as a trustee for those entitled to the effects in his hands.

Upon this principle, the fund in the hands of the defendant, brought with him into this State, might have been reached. But having voluntarily taken upon himself the office of guardian here, the case is free from all difficulty; and he must account in that character under our law.

As regards the extent of the defendant's liability to account in this case, the decree is entirely erroneous.

The income of the fund, as well as the principal, was expended by the guardian in the maintenance and education of the infant. And the decree assumes that the guardian acted properly in doing so, of his own authority, without the previous sanction of a Court of Chancery, and, therefore, ought to be protected.

Upon this point, also, the authorities disagree.

There is no doubt of the power of a Court of Chancery to break into the principal, or to authorize a guardian to do so, where the fund is so small that the interest will not afford the means of a competent maintenance and education to the infant. But according to the current of authority, the guardian is not at liberty to break in upon the principal of the fund, of his own authority. The *income* is the proper fund for the maintenance and education of the infant, and it is at the peril of the guardian, or trustee, if he exceed this. The fact that the

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income may be inadequate, does not essentially vary the principle. The discretion to break into the *corpus* of the estate, or fund, is entrusted to the Court, and denied to the trustee. Thus far, the authorities may be said, substantially, to agree. But, according to some of the authorities, this general doctrine is subject to certain qualifications; one of which is, that acts done by a guardian, or trustee, of his own authority which clearly appear to the Court, on inquiry, to have been beneficial to the infant; and such as the Court, on the application of the guardian, would have ordered to be done, will be protected. McPherson on Infants, 337, marg., and cases cited in notes.

On the other hand, it is held, that the unauthorized acts of a guardian, in breaking into the capital of the estate, without the previous sanction of the Court, will not be protected or confirmed by the Court. And this doctrine is maintained, in the case of a trustee, under a deed of trust, in *Hester v. Wilkinson*, 6 Hum., 215-219; also, *Phillips v. Davis*, 2 Sneed, 520-525.

Without stopping to inquire, whether the case of a special power given to a trustee, in a particular case, under a deed of trust, is, from the very nature of the case, distinguishable from that of a general guardian; and without expressing any opinion of our own, as to which of the doctrines above noticed is the more reasonable in itself; or most strongly supported by authority. We are of opinion, upon the facts of the case, taking into view the value of the complainant, Mary's services, her condition in life, and the kind of maintenance and education afforded her; that the encroachment upon the principal of the fund, was improvident, unauthorized, and not to be sanctioned, under the most favorable view of the law for the defendant. Hence, he must account for the principal of the fund. And the decree will be modified accordingly.

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MARY NICHOLS *et al.* v. T. J. CABE *et al.*

1. **MORTGAGE.** *Parol defeasance. Evidence. When title re-vests.* A deed for land, absolute upon its face, may be converted into a mortgage by parol evidence; and a Court of Equity will enforce the trusts and conditions annexed thereto. Thus, if a party under arrest, execute a deed to a third person to qualify him to become his bail, and to save him harmless as such, with the verbal agreement that the conveyee is to hold the land only so long as is necessary for these purposes, such deed is a mortgage; and if the risk is never incurred, or the mortgagee is saved harmless by the appearance of the mortgagor, the title reverts to the mortgagor.
2. **SAME.** *If executed for a fraudulent or immoral purpose.* If such deed is made for a fraudulent, criminal, or immoral purpose; or, to enable the parties to do any act in violation of law, or contravene any rule of public policy, the Courts will not interpose to grant relief; but will leave them, without redress, where their fraudulent conduct has placed them.
3. **SAME.** *Same. Evidence must be clear.* To repel a party that has been wronged, from the Courts, without redress, the fraudulent, criminal, or immoral purpose must be, clearly, made to appear. Presumptions will not be strained to defeat equity and justice, by closing the doors against the injured.
4. **SAME.** *Same. Who affected by fraud.* If a party has been guilty of such conduct as would repel him from the Courts, without redress, his widow and heirs would also be repelled.

FROM COCKE.

At the March Term, 1859, the presiding Chancellor, LUCKY, dismissed complainants' bill. They appealed.

A. J. FLETCHER, for the complainants.

T. D. & R. ARNOLD, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

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Asbury Nichols, now deceased, the husband of Mary, and the father of the other complainants, was in jail in 1849, in Cocke county, on a charge of counterfeiting. Being anxious to procure bail, and for the purpose of qualifying a friend named Aaron R. Clark to become such, by making him a freeholder, on the 22d of October, he made him a deed for his land under a parol agreement, that he should become bail for himself, and his fellow prisoner, Bugg, one or both. It is clearly shown by the proof, that there was no other consideration for the deed, although it purports on its face to be for \$400, then paid. On the disclosure of these facts to the Court, Clark was refused as bail, and at the next January Term of the Circuit Court, Nichols was convicted and sent to the penitentiary, where he, in a short time, died. Clark took possession of the land with the family of Nichols, and soon after conveyed it to defendants. Cabe, who was his step-son, was very young, and without means. Before the filing of this bill, in March, 1855, Clark left the country, and has not since returned. There can be no doubt but that the conveyances were both without any valuable consideration, and the latter with full knowledge of the nature and objects of the former. For this reason, as well as because of the want of consideration, Cabe cannot occupy the position of innocent purchaser, but must stand in the shoes of Clark. It is also very clear from the proof, that Clark was only to hold for the purpose of qualifying him to be taken as appearance bail, and for his indemnity as such. It was, in substance, a mortgage to qualify him for, and secure him against the liability he was about to incur as bail. It is proved, that by the understanding of both parties, he was only to hold the land as long as it was necessary for those purposes. If then, the risk was never incurred, or if it had been, and he saved harmless by the appearance of Nichols, his title would fail, as in case of a mortgage paid off, or rather where the injury or loss against which it was intended to secure the mortgage had not fallen upon him, or had never been incurred. If it be competent, by parol, to raise such trusts and conditions against an absolute

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deed, which, whatever we may think of its policy, in view of the statute of frauds, is now too well established to be controverted, this is one of the clearest cases for the application of the doctrine. Nothing was paid, or ever intended to be paid, no risk was run, and no damage sustained, by Clark. It would be iniquitous to allow him to retain the land against the complainants, if the merits of the case can be reached. But the defence is not placed upon the merits, but upon a sound and well approved legal rule, which, in cases to which it applies, repels parties from courts of justice, and closes the doors against them, no matter how great their wrongs may have been. This is where the party has been guilty of, or contemplated in the particular matter, some fraudulent, criminal or immoral act, some breach of good morals, or where the act was in violation of some rule of public policy. In such cases the Courts will not interpose, but leave the parties without redress, whatever claims they may have upon each other.

In this case the Chancellor based his action in dismissing the bill, upon the ground, that the object in conveying to Clark was improper, and against public policy. We do not give it that complexion. That the cause of the act done was to make Clark a freeholder, and as such, qualified to become bail, is clear. But was there anything wrong in that? If he had been received without the deed, the land would have been bound in the hands of Nichols, and if after the deed, it would be bound in his hands. The land, in either case, would stand as a security for the penalty of any recognizance or bail bond that might be taken. The purpose was to put Clark in condition to be taken by the Court, by making him a freeholder, which they thought to be indispensable, and, perhaps, such was the practice of the Court. What fraud was that intended to perpetrate? It could make no difference whether he paid anything for it or not, the land would have been equally bound to the State. No imposition was or could have been practiced upon any one. It is not unusual or contrary to public policy for a criminal to give bail, or to endeavor to procure bail, by conveying his property to others, to render them responsible for

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the penalties to be incurred. If Clark had been otherwise good, and this land had been expressly mortgaged in due form, or in any legal mode, for his security, there could have been no objections. What difference can it make where there was the double object of both qualifying and securing him? It is said that the object was to induce Clark to commit perjury before the Court, when offered as bail, by stating that the land was his. This was not at all necessary. It was sufficient that he had title to the land so as to bind it under his recognition. It was only important to the State that he had such a title as would subject the land in case of forfeiture. Nothing else was necessary to be stated to accomplish the objects intended. No necessity for false swearing was imposed by the transaction.

It is also insisted that the whole scheme was to get the criminal out upon bail, that he might make his escape from justice. If that were so, it would be such an unlawful purpose as would stain the hands of all concerned, and exclude them from the Courts. But there is no evidence that such was the intention. From all that we can see, nothing more was designed than to be admitted to bail in the ordinary way, and for the common reasons. We are not to strain presumptions to defeat equity and justice, by closing the doors against the injured. It ought to be a clear case of turpitude, or violation of public policy, to repel a party that has been wronged from the Courts of justice. The effect of applying the rule of repulsion in this case, would be to shield the defendants in a case of most glaring iniquity.

But there is another ground on which it is contended that the complainants should be repelled. The bill states that the title to the land was placed in Clark, or left in him, to protect the land from his creditors. The charge in the bill is that he, Nichols, "owed some small debts, and fearing that his family might be distressed by them, and their house sold for little or nothing, during his imprisonment, he concluded to leave the title in said Clark." If this were all, there would be a good ground for the argument, but the bill proceeds: "instructing

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said Clark that if any of his debts should be demanded during his absence, to pay them, by selling a portion of the land, if necessary. But for the purpose of enabling him to do this, without selling the land, he left a sufficiency of good claims in his hands for collection." Instead of showing any intention to defraud creditors, by leaving the title in Clark, according to this statement, the object was to secure them, by applying the land, if necessary, in addition to the other means placed in his hands, as trustee. This shows that Clark was invested with the title, in the first instance, to qualify him legally to become bail for appearance of Nichols and Bugg, and not as purchaser; and in this we see nothing unlawful, or in violation of public policy, or good morals; and when that purpose failed, he was to retain the title, not for himself, but for the benefit of creditors, and the helpless family of Nichols. The proof very clearly shows that this was the agreement and understanding of the parties, and that he was to retain the title no longer than it might be necessary for those purposes.

It is further said, that Clark removed some incumbrances from the land, resulting from some sale which had been made of it, under an execution or deed of trust, and has a deed from one Stokely for it. But if this be so, he must be held to have acted as trustee for Nichols, and can only claim to be refunded what he may have advanced out of *his own funds*. To ascertain how this is, and settle the amount between Clark, as trustee, and the complainants, there must be a reference to the Master. It is most likely, from what we see of the case, that neither Clark or Cabe have paid much, if anything, for the benefit of Nichols, out of their own means. But that will be open for investigation upon the reference. We think Cabe stands in no better situation, in any respect, than Clark, as he must have had full notice of all the equities of Nichols, and has not paid a consideration for the land, even if he had no notice.

Upon the whole we have no hesitation in granting relief to the complainants. Their misfortune in the inheritance of the disgrace of their ancestor, is not to preclude them from the

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protection of the Courts, unless, indeed, his acts were such, in this particular transaction, as to repel him; in which case, they would be equally excluded. But this, we have seen, is not their unfortunate predicament, upon either of the grounds assumed, or any other ground in the case.

The decree of the Chancellor is reversed, and a decree will be made here settling the rights of the parties as herein declared, and the cause remanded for the account. The defendants will be charged with rents, but credited for valuable improvements so far as they advance the permanent value of the land, but not beyond the rents. Whatever the defendants may have paid to remove any real incumbrances, or buy in any legal or equitable outstanding title, out of their own means, and for which they have not been satisfied, must be allowed to them.

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 LEWIS BEARD v. THE JUSTICES OF CAMPBELL COUNTY.

1. **ROADS. Jurisdiction. County Court. Jury. Appeal.** The determination of all questions connected with public roads, including both matters of law and fact, belongs exclusively to the County Court, with which a jury can have nothing to do. And an appeal lies from the action of said Court, which may operate as a broad appeal, or an appeal in error, according to the necessity of the case.
2. **SAME. Same. Appeal. Circuit Court.** On the removal of a cause, involving a contest about a road, from the County, to the Circuit Court, the whole proceedings are open to investigation upon the face of the record, or upon proof, without the intervention of a jury, just as they were in the County Court. The jurisdiction of the Circuit Judge, in such a case, is appellate, only, and if no extraneous evidence is offered, the Court must hear and determine the cause, as if it were before him on a writ of error.
3. **SAME. Parties. Costs.** In suits about roads, the Justices of the County Court, and the person or persons aggrieved, are the proper

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parties; and no private individual can be permitted, or compelled to enter into bond, and be substituted in the place of the Justices. Nor, is the party aggrieved liable for the whole costs. He is only liable for such costs as accrue after he becomes a party to the proceedings.

FROM CAMPBELL.

At the August Term, 1859, TURLEY, J., presiding, the judgment of the County Court was affirmed. Beard appealed.

EVANS, THOMAS, and MALONE, for the plaintiff in error.

McFARLAND, for the Justices.

McKINNEY, J., delivered the opinion of the Court.

The County Court of Campbell, on the application of Malinda Gibson, established a *third class* road in said county, which was laid out, in part, through the land of Beard. Damages were assessed to Beard at \$13.00, which sum was tendered to, and refused by him. The proceedings seem to have been all regular. Beard appeared, on the return of the report, and asked to be permitted to contest the establishment of the road, which was allowed; and from the order of the County Court, he prosecuted an appeal to the Circuit Court, having executed a bond in proper form, payable to the Chairman of the County Court, for the prosecution of the appeal.

In the Circuit Court, on application of Beard, Malinda Gibson, the applicant for the road, was required to give security for the costs of the case, being regarded as "plaintiff" in the controversy.

On the hearing, in the Circuit Court, the counsel of Beard asked the Court to direct issues of fact to be made up. The Court, it seems, refused to order issues to be made, but directed that a jury should be sworn "to try the matters in controversy between the parties." Afterwards, it was agreed by the parties to dispense with a jury, and submit all matters

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to the determination of the Court. Thereupon, the record of the proceedings of the County Court was read (without any thing further) on behalf of the Justices; and Beard having declined to offer any evidence, it was agreed by the parties that the Court, without further evidence, should determine the case upon "the legal effect of the record" of the County Court. The Court held, that the record presented a sufficient *prima facie* case to sustain the orders and proceedings of the County Court, and affirmed the same, rendering judgment against Beard, and his security in the appeal bond, for all the costs of the case. From which judgment Beard appealed in error.

The case was brought here upon the assumption, that the Circuit Court erred in treating the case as an appeal in error. There was no error in this. The determination of all questions connected with this general subject, belongs, exclusively, to the County Court, both matters of law and fact, with which a jury can have nothing to do. The appeal may operate either as a broad appeal, or an appeal in error, according to the necessity of the case. On the removal of the case to the Circuit Court, the entire proceedings are open to impeachment, upon their face, or upon proof, just as they were in the County Court. But, if no extraneous evidence be offered, and the proceedings be regular in form and substance, the Circuit Court, whose jurisdiction is only appellate in such cases, must, of necessity, revise the record as if it were before him on a writ of error; and not treat the proceedings of the County Court as vacated and annulled by the appeal, as seems to have been supposed by the appellant. The order requiring Malinda Gibson to give security for costs, as plaintiff in the case, was unauthorized; she was not a party in the legal sense, to the proceeding. This is a matter, however, of no practical importance, as the case resulted; the Justices having been properly made parties to the contest by the appeal and bond. The order for a jury was alike unauthorized, as we have already decided in another case at the present term.

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The only error in the record, is one not complained of, and that is, in rendering judgment against Beard for the entire costs of the case from the commencement of the proceedings. It is clear, that he can only be subjected to such legal costs as accrued from the time of his intervention. Upon no proper principle can he be made liable for such costs as may have previously accrued.

In this respect, the judgment will be modified, and affirmed in all other things.

SAMUEL HUMBARD'S HEIRS v. AIDEN HUMBARD'S HEIRS.

1. **SPECIFIC PERFORMANCE.** *Rescission. Contract.* The specific performance, or rescission of contracts, is not a matter of absolute right in either party, but is a matter of sound discretion in the Court, to be exercised according to what, under all the circumstances of the case, may appear to be reasonable and proper. And, unless a proper case is made out for the interposition of the Court, either to enforce a specific execution, or to order the contract to be cancelled, the parties will be left to their remedies in the *legal forum*.
2. **SAME.** *Effect of refusal.* If the right to a specific performance is denied, the existence of the covenant or agreement, interposes no obstacle in a Court of law, to the investigation and determination of the rights of the parties.

FROM GREENE.

On the trial, at the May Term, 1858, Chancellor LUCKY dismissed the original bill, and decreed for the complainants in the cross-bill.

T. D. & R. ARNOLD, for the complainants in the cross-bill.

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MAXWELL & MILLIGAN, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The original bill seeks a specific execution of a contract entered into between Aiden Humbard and his son, Samuel Humbard—both of whom are dead—for the conveyance of a tract of land, of about 170 acres, situate in Greene county; and the cross-bill seeks a rescission of said contract.

The contract is evidenced by an instrument under seal, bearing date 13th of January, 1846. The object of this arrangement was to secure to the father, and his wife, and an unmarried daughter, the means of support and maintenance during the lives of the old folks—both of whom were of an advanced age. By the terms of the covenant, Samuel Humbard was to be let into the immediate possession of the place; and was bound to give to the old people *one-third* of all that should be raised on the place; and if this were not sufficient, he was to furnish them a “decent support.” And the father was bound, on his son’s compliance with the stipulations of the covenant on his part, to make to him a good and sufficient conveyance, in *fee simple*, for said tract of land. The covenant contains various minor-stipulations, not necessary to be noticed in our view of the case.

Aiden Humbard died in 1849, and his wife died previously. Samuel Humbard died in November, 1853. The latter took possession of said place at the date of the contract, in January, 1846, and remained in possession till his death; and the complainants—who are his widow and children—have retained the possession ever since. On the — day of October, 1855, the original bill was filed by the children and widow of Samuel Humbard, to obtain a legal title to said tract of land, in pursuance of said covenant. This was resisted by the defendants, who are the other heirs at law of Aiden Humbard, on the ground of failure on the part of said Samuel Humbard to perform the stipulations of the contract. And on the 5th of May, 1856, said defendants filed a cross-bill, to have said

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contract rescinded, and the covenant cancelled, as forming a *cloud* on their legal title to said tract of land.

Much testimony was adduced, to establish, on the one side, a compliance with his contract by Samuel Humbard; and, on the other, his failure to perform the same. We deem it unnecessary to notice the proof, further than to remark, that it does not make out such a case as clearly entitles the complainants in the original bill to a specific execution of the contract. Such was the view of the Chancellor, and he dismissed the original bill. But the cross-bill was entertained, and a decree made rescinding the contract, cancelling the covenant, and decreeing a sale of the land, for the purpose of partition; and likewise charging the estate of Samuel Humbard with rent from the death of his father.

The decree in the original cause is correct, and will be affirmed; but the decree upon the cross-bill is erroneous, and must be reversed.

It must be remembered that applications to a Court of Equity, either for the specific performance, or rescission of contracts, is not a matter of absolute right in either party; but a matter of sound discretion in the Court, to be exercised according to what, under all the circumstances of the case, may appear to be reasonable and proper. Hence, it not unfrequently occurs, that the Court will refuse to decree a specific performance of an agreement, at the instance of one party; and yet will decline to order it to be cancelled, or rescinded, on the application of the other party; but will leave the parties to their legal remedies. 2 Story's Eq., sec. 693, 742.

Such, we think, was the proper course to have been pursued in the present case.

While the complainants in the original cause have not made out a clear case for a specific performance of the contract, it will be found, perhaps, on a careful examination of the proof, that the parties in the cross-bill have not made a better case for a rescission and cancellation of the covenant.

We see from the record, that Samuel Humbard and his fam-

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ily have been in possession of the land for upwards of ten years preceding the filing of the cross-bill, under said covenant. Whether or not any legal right to the land was thereby acquired, is a question upon which, at present, it would not be proper to intimate an opinion. This question is peculiarly appropriate to the legal forum, and the parties should have been left to litigate it there; but by the decree on the cross-bill, they are precluded from doing so. The delay of the complainants in the cross-bill to assert any right to the land, or to ask a rescission of the contract, for so long a period after the death of Aiden Humbard, and until after an application was made, by the other parties, for a specific execution of the contract, cannot escape observation, as a further reason for refusing to entertain the cross-bill.

It is obvious that, inasmuch as the right to a specific performance has been denied, the existence of the covenant interposes no obstacle, in a Court of Law, to the investigation and determination of the legal rights of the parties; and, consequently, there was no necessity for filing the cross-bill in this case.

It was error to charge the estate of Samuel Humbard with rent, under the circumstances of this case. But in the view we have taken of the case, it is not necessary to discuss this question.

The decree in the cross-cause will be reversed, and the cross-bill dismissed.

CLAIBOURN WALKER *et al.* v. ARCHIBALD MCCOY AND WIFE.

CONTRACT. *Imbecility. Fraud.* Although a contract made by a person of sound mind and fair understanding will not be set aside merely because it is a rash, improvident, or hard bargain; yet, if such contract be made with a person of weak understanding, arising,

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from the infirmity of age, or other cause, a natural inference arises that it was obtained by fraud, circumvention, or undue influence; and a degree of weakness of intellect, far below that which would justify a commission of lunacy, coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside an important deed made by such person.

FROM HAWKINS.

On the 6th day of June, 1853, Jane Epperson conveyed a tract of land to McCoy and wife, for the consideration (as expressed in the deed) of five hundred dollars. Jane Epperson died in January, 1857; and on the 7th of September, 1857, the other heirs and distributees—McCoy's wife being one—filed a bill in the Chancery Court to set aside said deed, on the ground that the said Jane Epperson was old and imbecile, and the defendants taking advantage of her weakness of intellect, by fraud and undue influence, procured said deed to be executed, without having paid the consideration therein specified. Much proof was taken on both sides. Chancellor LUCKY pronounced a decree for the complainants. The defendants appealed.

NETHERLAND and HEISKELL, for the complainants.

SHIELDS, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is a bill to set aside a deed of conveyance of a tract of land, executed by Jane Epperson to the defendant, Archibald McCoy, on the ground that he imposed upon her, and obtained the deed by fraud.

She is dead, and the complainants, with defendant, Margaret, the wife of McCoy, are her heirs at law.

The Chancellor was of opinion that complainants were

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entitled to relief, and so decreed; and in this opinion we concur.

It is a rule in equity, that although a contract made by a man of sound mind and fair understanding will not be set aside merely from its being a rash, improvident, or hard bargain; yet, if the same contract be made with a person of weak understanding, arising from the infirmity of extreme old age, or other cause, there does arise a natural inference that it was obtained by fraud, or circumvention, or undue influence. And a degree of weakness of intellect far below that which would justify a commission of lunacy, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside an important deed. 1 Story's Eq., secs., 234-237.

Testing the case by these principles, how does it stand? Notwithstanding the defendants' statement, in their answer, that they paid Jane Epperson \$500, the consideration expressed in the deed as the price of the land, and the care they have taken to prove it by the attesting witnesses to the deed, and by others, and though they deny that they re-possessed themselves of this money again, and withheld it from her, yet we are satisfied the answer is, in this respect, untrue. Jane Epperson was a childish old woman, nearly eighty years of age, with enfeebled intellect, and unable, as we think, to guard herself against imposition, or to resist importunity, or undue influence. The only estate of any value which she possessed was this tract of land—one hundred acres. It was her home. She conveys it to her son-in-law, McCoy, and thus deprives herself of all she had. No reason is assigned for the act. Why she should make this conveyance to the defendant, McCoy, at the expense of other kindred, children and grandchildren, nowhere appears. The consideration recited, but in reality not paid, is only \$500—when we are satisfied the land was then worth \$700, and that it is now of the value of \$1200. Though the deed is formally executed and attested, the contract itself seems to have been made in secret. No witness knows or heard what lead to it. Its terms, or the

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motives to it, are not stated by the said Jane, or the defendants, to any one whatever. Prudence, not to say fairness, required at the hands of defendants that some respectable persons should have been made acquainted with this transaction, in order that the rights of this old lady might be protected. But this was not done. We are impressed with the belief, from the proof, that she was made ready for this conveyance by the wiles of the defendant, Margaret; that the deed was prepared at the house of defendant, and that she was then sent for, and executed it. Great pains are taken to have the deed executed and the money paid in the presence of witnesses, so as to give the transaction the appearance of a sale. But, in reality, it was not a sale. It would seem that there was an agreement between Jane Epperson and defendants that the money should be restored to them, since this was actually done, very soon after the making of the deed, and no note, bond, or other instrument, to account for it, taken by her or them. And when defendant, McCoy, is charged with having made such an agreement, he does not deny it. If this be so, it is palpable that defendants entered into a scheme to possess themselves of the estate of this old lady, without making her any payment for it; and that they have succeeded in effecting it.

With these facts before us, it is difficult to resist the conclusion that this deed is fraudulent. If fair, the transaction was certainly capable of a more satisfactory explanation, and it was incumbent upon defendants to furnish it.

The decree of the Chancellor will be affirmed.

M. Goldman v. The Justices of Grainger County.

M. GOLDMAN v. THE JUSTICES OF GRAINGER COUNTY.

1. PUBLIC ROADS. *Appeal. Code, § 1191.* The provision of § 1191 of the Code, relative to appeals in controversies about public roads is confined to the parties "interested or aggrieved." It does not embrace every citizen of the county, but only applies to such as are peculiarly concerned, on account of some special interest in the matter not common to others.
2. SAME. *Same. Classification of public roads. Code, §§ 1183, 1184.* The classification of the public roads belongs to the County Court; and all stage roads are put in the first class. If no classification is made by the Court, said roads are to be worked on and kept in the manner prescribed for roads in the first class. In this case, the petitioner applied to the County Court to make the road—on which he was running a two-horse stage—a first-class road, which was refused by the Court. Held, that as the refusal of the Court, and the running of the stage, made it a first-class road, he was not aggrieved by the order of refusal, so as to entitle him to an appeal.

FROM GRAINGER.

This was an application to the County Court to change a road from a second to a first-class road. The Court refused the application. The petitioner appealed to the Circuit Court, where his appeal was dismissed, PATTERSON, J., presiding, and he appealed to this Court.

SHIELDS & JARNAGIN, for the petitioner.

McFARLAND, for the Justices.

CABUTHERS, J., delivered the opinion of the Court.

Goldman presented his petition to the County Court of Grainger, at its July session, 1859, to change the road leading from "Rutledge by way of the Mouth of Buffalo, Ores Ferry," from a second to a first-class road, upon the ground

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that it had become a stage road, and that the United States mail was then, and had for some time been, carried over it, in two-horse stages. The Court refused the application, and he appealed to the Circuit Court, where his appeal was dismissed without investigation of the merits of the application, upon the ground that the petitioner for a road had no right to an appeal.

It is supposed that the right of appeal is given to the petitioner by the Code, § 1191. This is confined to "the parties interested or aggrieved." It does not embrace every citizen of the county, but only applies to such as are *peculiarly* concerned, on account of some special interest in the matter not common to others. This was not a "controversy relative to the *laying off, discontinuing, or establishing* a public road," in the language of the section referred to, and in which the appeal is given. But if it were, who may appeal? A person "interested or aggrieved." The petitioner has no interest above any other citizen. He is only the informer, or relator, and barely brings the matter to the notice of the Court, for its consideration. This does not make him a party, or invest him with any interest in the matter above others.

The principle settled in the case of *Cary v. The Justices of Campbell county*, 5 Sneed, 515, settles this case against the appellant.

But upon the merits, perhaps the same result would follow, as, if it be not a matter of discretion in the County Court to classify the roads of the county or not, which is probably the case, there was no necessity to act upon the petition at all, as the law—§ 1183 of the Code—provides that "stage roads" are in the first class. To place other than stage roads in that class, requires the action of the Court. But by § 1184, if the Court "fail or refuse to class the roads of its county, they shall be worked on and kept in the manner prescribed for roads in the first class." So, on this ground, the petitioner had no interest in the matter, because by the refusal he gained what he desired; and, indeed, the previous failure to do what his petition required had, by operation of this

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section, placed this road in the first class, and, consequently, his petition was useless, and the refusal of it did not affect his interest so as to authorize him to appeal, even if the ground first assumed were not correct, as we think it is.

The judgment of the Circuit Court, dismissing the appeal, will be affirmed.

SAMUEL MCCAMPBELL v. SAMUEL THORNBURGH.

1. **SLANDER. Evidence.** Under the *general issue*, evidence to prove that the words spoken of the plaintiff are true, is inadmissible. This would only be admissible under the plea of justification, or under the *general issue*, with notice of such defence.
2. **SAME. Same. Case in judgment.** The defendant was sued in slander, for charging the plaintiff with having committed *perjury*, in giving his evidence as a witness in a controversy about the establishment of one of two rival roads. He stated that one of said roads "could be made a good road with a little fixing." Held, that evidence that said statement was untrue, is not admissible under the *general issue*, without notice of the defence.

FROM JEFFERSON.

This cause was tried at the April Term, 1859, of the Circuit Court, before Judge GAUT. The jury returned a verdict for \$3 damages. The plaintiff moved for a new trial, which was overruled, and he appealed.

NETHERLAND & HEISKELL, CROZIER & REESE, and MEEK,
for the plaintiff.

T. D. & R. ARNOLD, and MCFARLAND for the defendant.

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CARUTHERS, J., delivered the opinion of the Court.

Thornburgh said of McCampbell, that he had *sworn a lie, in a road case*, before the County Court of Jefferson. The jury found the defendant guilty, and assessed the damages at *three dollars*. The plaintiff appealed from the judgment the Court, refusing his motion for a new trial.

The pleas were *not guilty*, and the statute of limitations. The first error assigned is upon the admission of evidence, upon the defence, under the plea of not guilty, which, it is alleged, could only have been done under a plea of justification, because it tended to show the truth of the charge.

Facts: At the March session, 1853, of the County Court of Jefferson, the defendant presented a petition for a new road, of the second class, between the points designated. Upon that application, after the report of the jury in favor of the road, an investigation arose before the Court, as to the necessity of the road, in which the plaintiff was examined as a witness against the report. The contest was, which of two roads—the one reported, or another then in existence—should be established or kept up. Witness, Birdwell, proves that he was a magistrate, on the bench at the time, and swore, and examined the plaintiff as a witness. He proves “that the question in said road case was, what kind of a road it (the rival road in question) was, and the plaintiff swore *that said road could be made a good road with a little fixing.*” It was in reference to this oath the imputation was made. The defendant was permitted to prove on the trial, against the objections of the plaintiff, that the road was not a good, but a very bad one, and that a *little* work or “fixing” would not put it in order, or make a good road of it; but that it would require a good deal of work, and several hands for some time, as well as the blasting of rock, to make it good. The quantity of labor, and number of hands, and length of time; it would require to make it a good road were allowed to be proved. Now, the question is, was this proof admissible, under the *general issue*? and we think it clearly was not. What else

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was it but evidence to show that the oath of the plaintiff was false, and the charge that he swore a lie, true? This could only be done under a plea of justification, which would give the plaintiff notice that such was the issue to be tried. Such is the rule everywhere settled. 2 Greenl. Ev., §§ 424, 425; 2 Swan, 34; *West v. Walker*, 4 Sneed, 524.

This can neither be done in bar of the action, *or in mitigation of damages*. It is difficult to conceive how this salutary and well established principle could be more palpably violated than it was in this case. The issue was, whether the slanderous words were uttered or not, and the proof was to show that the charge of perjury was true; that is, that the road was not such as he swore it was. To have authorized this, surely, a plea of justification must have been introduced. The effect of this illegal evidence is palpable enough in the verdict rendered for three dollars damages. If a defendant intends to rely upon the truth of the charge he has made, he must plead it, and come up to the issue. If the plaintiff has, indeed, sworn a falsehood, he must submit to the demolition of his character, but this is not to be destroyed in a Court of justice, illegally.

But the force of this rule is attempted to be avoided, or rather evaded, in the argument, by a resort to another rule stated in 2 Greenl., sec. 424, and recognized in *West v. Walker*, that it is competent for the defendant to show under the general issue, that the charge was occasioned by the misconduct of the plaintiff, either in attempting to commit the crime imputed, or leading the defendant to believe him guilty of it. It requires no argument to show that has no application to a case like this.

It is frankly admitted in the argument, that the defendant cannot safely rely upon a plea of justification. But still he had all the advantages of it, without its responsibilities, on the question of damages, if not as a defence. This is an evasion or perversion of the law, not to be allowed in any case, but more particularly where that which is most dear to the citizen, his good name and reputation, is at stake.

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This is a case of considerable aggravation, if the charge was untrue. Perjury, one of the most odious and disgraceful crimes in the estimation of all good men, is again and again imputed, and boldly and actively circulated against a man who has proved a good character among his neighbors. If this was done untruly and maliciously, or recklessly, it deserves the most exemplary reprobation at the hands of a jury. On the supposition of the plaintiff's innocence of the crime, the verdict rendered is but a mockery of justice. Instead of recovering damages for the injury done him, he is mulct with a heavy bill of costs, as the damages are under five dollars. The costs amount to about \$300 in all.

As what he stated was only in the nature of an opinion as to the quality of the road, and the labor it would require to make it a good one, it was uncharitable, to say the least of it, though his opinion or judgment might be considered incorrect by a dozen other men, to charge him with wilful and corrupt perjury.

Under the facts of this case, as we see them in the record, particularly if the illegal evidence be excluded, we would feel constrained to grant a new trial, if no error of law had been committed by the Court, on the single ground of the inadequacy of the damages. If this action is to be resorted to for the vindication of injured character, instead of, and to prevent acts of violence, which is one of its main objects, Courts and juries must see that it shall answer the ends designed, by making the redress commensurate with the injury. Otherwise, the law will be regarded as an inadequate protection, and the peace of society endangered by men undertaking to avenge their own wrongs instead of resorting to this peaceful remedy given by the law.

The judgment will be reversed, and a new trial awarded.

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THE STATE v. THOMAS CRUTCHFIELD'S EXECUTORS.

1. **GRANT.** *No warranty of title by the State.* The State does not warrant the title to lands granted by her. Persons are permitted to enter any lands subject to entry, but it is done at their risk; and upon failure of title, enterers are not entitled to recover from the State the money paid by them.
2. **SAME.** *Voluntary payment by the State. Interest. Act of 1844.* The act of 1844 made provision for the refunding of certain moneys paid for lands entered in the Ocoee district, but this act creates no liability on the part of the State to pay the interest on the sums thus refunded.
3. **SAME.** *Same. Same. Same. Accord and satisfaction.* But if, independent of the act of 1844, the State had been liable for the moneys paid, together with the accruing interest, she, by that act, proposed terms of adjustment, which were accepted by the enterers, and a settlement made according to the terms proposed, which was a satisfaction of all demands against her, growing out of said entries.
4. **STATE.** *When she may be sued. Statute of limitations.* Actions may be instituted against the State under the same rules and regulations that govern actions between private individuals, except as to the pleading of the statute of limitations.

FROM HAMILTON.

This was an agreed case, before his Honor, Judge GAUT, who, at the March Term, 1859, rendered judgment in favor of the plaintiffs. The Attorney General, BRIDGES, on behalf of the State, appealed.

HEAD, Attorney General, for the State.

BURCH, WELCKER & KEY, and GAUT, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

This is an appeal by the State from a judgment of the Law Court of Chattanooga, against her for \$2,583, in an action of

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assumpsit. The case was submitted to the Court on this agreed state of facts :

“ Thomas Crutchfield, deceased, did, in his lifetime, to wit, on the fifth, sixth, and twelfth days of November, 1838, enter in the entry-taker's office of the Ocoee district, Tennessee, lots one, two, three, and four, in island number one, in Tennessee river, known as ‘ Jolly's Island,’ situate in Meigs county. Upon said days said Crutchfield paid to the entry-taker the sum of \$4725.50, for the lands in said lots, there being six hundred and thirty acres of said land, which was entered and paid for by said Crutchfield, at the rate of \$7.50 per acre. On the 30th of January, 1839, a grant was issued by the State to Crutchfield. Said lands were in the possession of Martin Hammock, Abner Hanner, John W. Rhodes, and Jas. H. Rhodes, who claimed the lands under a superior title. Crutchfield brought an action of ejectment against them in the Circuit Court of Meigs county, which was determined in favor of the defendants. Crutchfield carried the case by appeal to the Supreme Court, and there the judgment was affirmed on the 23d of July, 1843. Crutchfield's title from the State was held invalid, and judgment for the cost, amounting to \$124.43, was rendered against him. On the 3d of April, 1844, the State, by act of Assembly, refunded to Crutchfield the sum paid by him in 1838 to the entry-taker, to wit, the sum of \$4725.50.”

The Court gave judgment against the State for \$2583.89, which was made up by the interest on the said sum of \$4725.50, from the time it was paid to the entry-taker, (November, 1838,) and the cost paid by Crutchfield in his unsuccessful suit for the land.

The State could not be sued until the act of 1855, carried into the Code, section 2807. That provides that “ actions may be instituted against the State under the same rules and regulations that govern actions between private persons.” Before this act, demands against the State could only be asserted by appeal to the Legislature. But now the State may be made liable in the courts like “ private persons.” So, the parties

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are properly before the Court, and the case is to be decided by the laws governing the rights of individuals. The act takes from both parties the right to plead the statute of limitations. Code, § 2762.

The Legislature, in 1844, (ch. 93, § 2,) passed an act making provision for this and other such cases. It provides that in cases of entries of land in the Ocoee district, "the title to which has been controverted, and the question judicially determined that the entry of the land in the Ocoee district, and the grant thereon obtained, is void, the money so paid into the entry-takers's office aforesaid shall be refunded to said enterer or enterers in the manner hereinafter prescribed." This act was passed on the 15th of January, 1844, and on the 3d of April following, Crutchfield brought himself within its provisions, and received from the State the sum he had paid in November, 1838. This suit, to recover the interest on that sum and the cost expended by him, was instituted on the 29th of July, 1856.

We think his Honor erred in holding that the State was liable upon this state of facts. The State does not warrant the title to the land which she grants. She opens her offices, and permits individuals to enter, at their own risk, any lands they choose, and she issues her grants. They must beware of the titles they get. A private person is not bound for title without warranty, much less the public or State. But under a high sense of equity and justice in the particular case described in the act of 1844, where individuals had paid the money in good faith, and had lost their lands because of their entry in the wrong office under the decision of the Courts, the Legislature made provision, by the act referred to, for refunding the amount actually paid into the treasury. They were not bound to do this much. It would be very singular if the voluntary payment of the principal would impose an obligation to pay the interest also. It would have been a plausible argument to the Legislature that, as they recognized the right of the enterer to be refunded the amount actually paid, they ought also to pay the interest as an incident. But the asser-

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tion of a legal claim to it is a very different thing. The sense of justice of the Legislature might still be appealed to for the interest, but not the Courts.

But, in addition to this view, and upon the assumption that there was a legal obligation upon the State to pay the amount improperly received with *accruing interest*, the plea of accord and satisfaction in this case would, probably, be a good defence. The Legislature, in 1844, proposed terms of adjustment; that is, to refund the money paid, and Crutchfield accepted it. Must not that be regarded as a final settlement of the claim? We think so. The question before a Court is not what is morally, but what is legally right.

Entertaining these views of the law, we are constrained to reverse the judgment of the Circuit Court, and give judgment in favor of the State upon the agreed case.

HENRY SMITH v. THOMAS K. CORN, FOR THE USE OF SAMUEL SMITH.

CONTRACT. *Construction.* *Note to be paid in a particular manner.* If a note be executed for money, with the privilege to the defendant to discharge it in a different manner—the place, but no day being fixed for the performance of the condition—it is a good defence thereto to show a readiness and ability, at the place fixed, whenever called on, to discharge the same in the manner stipulated.

FROM JEFFERSON.

This cause was heard, upon appeal from a Justice, at the April Term, 1859, GAUT, J., presiding. Judgment for the plaintiff. The defendant appealed.

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CROZIER & REESE, for the plaintiff in error.

J. P. SWAN, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a justice. The foundation of the suit is two notes, the first of which is as follows:

"\$25. Due Thomas K. Corn or bearer, twenty-five dollars, for value received of him, which may be discharged in *feeding droves of stock of any kind, keeping travellers, ferriages, &c., at cash prices, at my stand, at the mouth of Chucky, in Tennessee.* Given under my hand, this 11th day of May, 1849.

HENRY SMITH."

The other note is in the same words, except that the amount is but twenty dollars.

The question was submitted to the Circuit Judge, by agreement of the parties, whether, upon the face of the notes, the plaintiff was entitled, by law, to demand and recover the amount of money expressed to be due, in the absence of all proof showing that the defendant had been called on, or requested, to discharge said notes in either of the modes stipulated therein; or that he had in any way disabled himself to so discharge them; or that he had been in default, in any respect, in the performance of the obligation, on his part, except his refusal to pay money in satisfaction of the notes. And this is, in effect, the question for our determination. His Honor, the Circuit Judge, held that the plaintiff was entitled to recover. In this we think there is error. This was to change the contract of the parties, and to force upon the defendant a different mode of payment from that stipulated, without any breach, or default, or inability to perform, on his part. No case precisely similar in its facts, has been produced; but the principle governing the case is familiar. The case is not within the act of 1807, ch. 95, sec. 1. The place of performance is fixed, but no time. And the legal effect of the obligation imposed on the defendant was, that he should

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be, at all times—so long as the obligation remained in force—ready and willing to perform his undertaking in all, or either, of the stipulated modes, at the election of the other party. This was all that could be demanded of him; and such readiness and willingness to perform, was a complete defence for him.

The contract, it is true, is a money contract, with the privilege to the defendant to discharge it in a different manner. And hence it is incumbent on the defendant to be prepared to show performance, or that he was ready and willing to perform; and on failure to make this appear, the other party would be entitled to recover the money. The mode of performance must, of course, depend upon the nature and terms of the contract. In the present case, the defendant had nothing to do but to be in readiness, at the place fixed, to do either of the things agreed to be done, when called on to do so, and if never called on to perform, he was discharged from the obligation of his contract.

The principle is the same as if the defendant had reserved the privilege of discharging the note in some specific article. In the latter case, (if a time were fixed) to constitute a good defence, the defendant must aver and prove that he had the article ready to deliver on the day and at the place fixed, and has continued ever since ready to deliver the same. 10 Yer., 245. If no day was fixed, it must be shown that he was in like manner ready to deliver the property at all times, from the date of the contract. And this will defeat the plaintiff's right to recover money.

So, in the present case, it is a good defence that the defendant was at all times, from the date of the contract, ready to discharge the note in the manner provided; but the other party never called on, or requested him to perform.

It follows, therefore, that the judgment must be reversed.

The State v. Martin Pennington.

THE STATE v. MARTIN PENNINGTON.

CRIMINAL LAW. *Indictment Throwing down fence.* In indictments for misdemeanors, a substantial description of the offence charged is all that is required. It is proper to pursue, in indictments, the language of the statute creating the offence, but this is not indispensable. An indictment, therefore, for injuring the fence of another, is good, if it charges the offence to have been committed "*unlawfully, maliciously, and wantonly.*"

FROM SCOTT.

The indictment was quashed in the Court below, GARDENHIRE, J., presiding, because the word "wilfully" was omitted. The State appealed.

HEAD, Attorney General, for the State.

YOUNG, for the defendant.

CABOTTERS, J., delivered the opinion of the Court.

This is an appeal in error by the State, from a judgment of the Circuit Court of Scott county, quashing the indictment for malicious mischief, in throwing down the fence of Nathaniel Hammond. The offence is created and defined in the 11th paragraph of the 5652 section of the Code. The descriptive words are:

"To *wilfully* and maliciously * * * * * throw down any fence."

The punishment is, "imprisonment not exceeding three months, with, or without fine."

The indictment describes the offence in this case, thus:

"The said Martin Pennington, on the 24th of July, 1858,
* * * * * *unlawfully, maliciously and wantonly*

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did throw down a certain fence, the property of Nathaniel Hammond."

The defect, for which the indictment was quashed, as we are informed in the argument, is, that the word "wilfully" is omitted, and the words, "unlawfully and wantonly," substituted in the description of the offence.

A substantial description of the offence is all that is required, *Bilbo v. The State*, 7 Hum., 534. The offence is created by statute, and consists in *wilfully* and maliciously throwing down the fence of another. The indictment omits "*wilfully*," but inserts "*unlawfully and wantonly*." The act charged could only be "unlawful," by being done in violation of the statute, for by that alone it is made an offence.

It is safest to pursue the language of the statutes in all indictments, but it is not indispensable to do so, if the offence is accurately described in other words. To throw down another's fence "wilfully and maliciously," constitutes the crime. Would not the words of this indictment, "unlawfully, maliciously and wantonly," convey as perfect an idea of the crime charged, as those in the statute? There may be a difference in the definition of the words in the dictionaries, but in substance, and in law, the offence imputed is the same, and the description of the offence, as accurate and well understood by one mode of expression as the other. It would savor too much of the technical precision, of days that have passed, which so much obstructed the administration of justice, to give effect to an objection like this. In this change from the form to the substance of things, neither the Courts nor the Legislature will be apt to retrace their steps.

We think there was error in quashing the indictment, and therefore reverse the judgment, and remand the case for trial.

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ROBERT B. RHEA v. OWEN M. WHITE *et al.*

1. **CONTRIBUTION.** *Among wrong-doers.* The equity of contribution arises where several persons are bound by a common charge, not arising *ex delicto*, and their order of liability has been accidentally deranged. If the liability be joint, he who has paid more than his share, is entitled to contribution from the rest. But this equity can never exist if the charge is not *binding*, or the liability arise *ex delicto*, for there can be no contribution among *wrong-doers*.
2. **SAME.** *Same. When distributees can have contribution. Slaves.* If an ancestor purchase slaves in which his vendor had, only, a life estate, and upon his death, his distributees make a division of said slaves, they, *eo instanti*, become wrong-doers, and may be sued by the true owner. And the distributees who draws said slaves, being *in pari delicto*, cannot, if sued, and the slaves recovered, have contribution from the other distributees, unless he aver and prove that said division was made by *mistake*, and in *ignorance* of the want of title in the ancestor.
3. **WARRANTY.** *Implied. Limited by the covenant of the parties.* When there is an express covenant between parties, more limited in its nature than the covenant the law would imply, the implied covenant will be limited by the agreement thus entered into, and the parties will be bound thereby.
4. **EVIDENCE.** *Record, how far evidence.* The record of a cause is not evidence in any other suit, except between the parties to said record, only of the fact of the judgment, and of the damages and costs recovered.
5. **SAME.** *Same. When evidence and depositions a part of the record.* The evidence and depositions taken in a cause, are no part of the record, unless made so by a bill of exceptions, &c.

FROM SULLIVAN.

At the May Term, 1858, Chancellor VAN DYKE presiding, a decree was pronounced in favor of the complainant. The defendants appealed.

L. C. & M. T. HAYNES, for the complainant.

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NELSON and HEISKELL, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is a bill for contribution. In the examination of this record, we have been anxious to find some ground, consistent with the rules of equity practice, upon which to relieve complainant; and our first impressions were, that we could do so. But upon a more careful inquiry into the facts and authorities of the case, we are satisfied we cannot.

The equity of contribution, arises when several persons are bound by a common charge, not arising *ex delicto*, and their order of liability has been accidentally deranged. If the liability be joint, he who has paid more than his share, is entitled to contribution from the rest. But this equity can never exist if the charge be not binding, or the liability arise *ex delicto*; for there can be no contribution between wrongdoers. The reason of this is, that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences. *Merriweather v. Nixon*, 8 T. R., 186; *Peck v. Ellis*, 2 J. C. R., 131.

Now what is the case stated in the bill for relief, and how do these principles apply to it? It is, simply, that in 1828, Matthew Rhea purchased of David and Samuel Hanby, a slave, Eliza, called in other portions of the record, Louisa; and afterwards, in October of the same year, died, leaving six children; that though his purchase was of the entire property, yet his title was defective, and he only, at most, acquired an estate for the life of David Hanby and others, the title to the remainder in said slave being in the children of Samuel Hanby. That this slave remained the property of the estate until the 2d of June, 1836, having in the meantime had three children, Sam, John and James, when (the life estate having terminated) they, with their mother Eliza, and one other slave, Charles, were divided among the above named children, and distributees, of Matthew Rhea, as *their property*, though, at that very time, they belonged absolutely to the children of

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Samuel Hanby, who, in the year 1843, brought suit in the Federal Court, at Knoxville, against complainant, who is one of the children of Matthew Rhea, and defendant, Owen M. White, who had married another child, for the whole of said slaves; and in October, 1851, obtained the verdict of a jury for *damages* to the amount of \$2550.00; the complainant and said White, to use the language of the bill, *being thus "onerated for the joint act of the whole of the distributees with the whole value of the family of negroes."*

This verdict, upon an application for a new trial, was reduced, by a remittitur, to \$2200, for which judgment was rendered, and the whole of which, with costs, complainant has paid, the said White being unable to pay anything.

The object of the bill is, to have this recovery equalized among the other five children, or their estates, so as to cause them to share the same with complainant.

The bill concedes, necessarily so, that this judgment was proper. And the record of the recovery in the Federal Court, which is an indispensable link in the complainant's testimony, shows the action to have been *trover*, for the wrongful conversion of the slaves; and that the trial was had upon the pleas of *not guilty*, and the statute of limitations.

We understand this record to be evidence against the defendants, unless it be the defendant, Owen M. White, who was a party only of the fact of the judgment, and of the damages and costs recovered. 1 Greenl. Ev., secs. 527, 538, 539; *Martin v. Conles*, 2 Dev. & Batt. R., 101. It does not, as against them, establish the superiority of the title of Samuel Hanby's children; and we cannot look into the depositions and other evidence in *that cause*, for the purpose of affecting defendants, they not being parties; and for the further reason, that these depositions and this evidence seem to be no part of the record, not having been made so by bill of exceptions, and though certified in the transcript, are no part of it. The answers of defendants call in question the title of Samuel Hanby's children, and upon strict law, it might be difficult for complainant, upon this record, to show that their recovery was

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warranted. But if we look into the record and proof in the case in the Federal Court, complainant will not be aided. The title of Samuel Hanby's children was of record in Patrick county, Virginia, the same having been derived by deed from David Hanby in 1825; and in the sale to Matthew Rhea, in March, 1828, and to his heirs in November of the same year, of the slave Eliza. David and Samuel Hanby were guilty of a fraudulent breach of trust, having assumed to dispose of the entire interest, when it is manifest the title to said slave was in the children of Samuel Hanby, subject only to a life estate in David Hanby and wife. *King et al. v. Sharp*, 6 Hum., 55. And if we concede that Matthew Rhea, and his children, acquired the life interest of David Hanby and wife, yet, that estate ceased with the death of the longest liver, in 1834; and the division of Eliza and her increase, in June, 1836, by Matthew Rhea's children, was, *eo instanti*, a wrongful conversion, for which they, or any of them, might be sued by Samuel Hanby's children. 1 Dev. R., 306; 2 Kent, 323-4. The bill and the Chancellor's decree proceed upon this principle; and we are satisfied from other facts the recovery was so had. The slave Eliza, in the division, was assigned to complainant; and after that event, and previous to the institution of the suit in the Federal Court, she had three other children, Joseph, Maria and Daniel. These, with the mother, and the three born before the division, we think, constitute the seven slaves embraced in the recovery. It is not probable that it extended to Moses and Mary, children of Eliza, born after the bringing of the suit in *trover*; their value, we apprehend, not being a proper subject of inquiry in *that action*. 2 Greenl. Ev., sec. 276; *Vines v. Brownrigg*, 1 Dev. and Batt. R., 239; *Bethra v. McLennon*, 1 Ird. R., 531.

It will thus be seen, that as to the slaves Eliza, Sam, John and James, the recovery must have been upon the *joint conversion* of complainant, and the other children of Matthew Rhea, growing out of the division and other wrongful acts antecedent thereto; and as to the slaves Joseph, Maria and

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Daniel, upon the *personal* and *individual wrong* of complainant. We need but state the case, to see there can be no relief. It is not even assisted by an allegation in the bill of ignorance of the title of Samuel Hanby's children, or that the division was made in *mistake*, because of any belief in the validity of Matthew Rhea's title, if that could be of any avail.

Some of the authorities go so far as to say, that with respect to mere breaches of trust, not involving any *actual fraud*, contribution may be had. But we apprehend these will be found to be cases growing out of the non-performance of civil obligations, or contracts. Such is the case of *Lingard v. Bromley*, 1 Ves. & B., 114; also, *Thweath's Adm'r v. Jones' Adm'r*, 1 Randolph, 328. Where the recovery is for a *tort*, as contradistinguished from a *contract*, I find no authority for contribution; and Lord Kenyon, in *Merriweather v. Nixon*, says there is none. And to the same effect is *Lingard v. Bromley*.

But without further examination of this doctrine, we think we may safely say, that a recovery against a party in *trover*, for a *joint wrong*, *prima facie*, at least, if not conclusively, so places him in *pari delicto*, as that he can have no contribution unless he aver and prove his innocence of the wrong; and that is not done in this case. *Thweath's Adm'r v. Jones' Adm'r*, 1 Randolph, 328.

If a covenant for contribution or indemnity could be allowed to prevail among joint wrong-doers, yet we do not see that any was made, or existed, in the division of the slaves between Matthew Rhea's distributees, on the 2d of June, 1836, that can be of any assistance to complainant. The instrument of that date, executed between them, appears, simply, to be a quit-claim deed, wherein the slaves are divided with, at most, only a stipulation against any claim by the parties, *their heirs, executors, and assigns*, and contains no covenant of general warranty. The words, "agree to support to each other the above named negroes as divided above, by paying to each other the amount agreed on to each other, so as to make all

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the heirs equal in said negroes," cannot, as we think, be so regarded. The entire phrase, as used here, is singular and unusual. But we think its only effect is a stipulation to pay such sums of money as were due between the parties, in order to equalize the division, and that it was not intended to have any greater extent.

We furthermore think, if the law implies a warranty of title in the *division* of chattels, as in their *sale*, yet the implication here is excluded, as well by force of the quit-claim deed as the express covenants to be found therein. And so are the authorities. It is a rule, that where there is an *express covenant*, more limited in its nature than the covenant the law would imply, the implied covenant will be restrained by the mutual consent of both parties. *Vanderkarr v. Vanderkarr*, 11 Johns. R., 122; *Kent v. Welch*, 7 Johns. R., 259; *Nokes' Case*, 4, Rep. 81.

If the complainant, by reason of the recovery in the Federal Court, fails to get his share in the slave Charles, still, as the bill is not framed with a view to that aspect of the case, and especially as it makes no case of *mistake*, as was done in *Dacre v. Gorges*, 2 Simons and Stewart, 454, we are unable to grant him relief even as to that branch of the case. As before remarked, he does not even allege the existence of an honest belief in Matthew Rhea's title at the time the slaves were divided. If aware of its defect, at the time, we perceive no ground on which to aid him. It was incumbent on him to make out his title to relief, in his bill.

The Chancellor's decree will be reversed, and the bill dismissed.

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1. **CRIMINAL LAW.** *Empanelling jury.* Court may, for cause, reject a juror, before the jury is sworn. The Court, even in a capital case, has the discretionary power to reject a juror, before being sworn, for improper conduct, or other sufficient cause.
2. **SAME.** *Same.* Number of the panel after a juror is discharged. If, after the jury in a criminal case is selected, one of the number is discharged by the Court, the prisoner is not entitled to a full panel of jurors out of which to fill the vacancy. He is only entitled to the number allowed if the juror had not been selected.
3. **SAME.** *Peace officers may arrest on suspicion.* Code, § 5037. *Murder.* By the common law, a peace officer may make an arrest on a charge of felony, upon a reasonable cause of suspicion, without a warrant, although it should afterwards turn out that no felony had in fact been committed; and if such officer is slain in attempting to make the arrest, by the party charged, it will be murder.
4. **SAME.** *Same.* Not bound to make known the cause of arrest. When a party is taken in the commission of an offence, or upon fresh pursuit, or when the officer is violently assaulted upon coming up with the accused the officer is not required to make known his authority or the cause of the arrest, and if he is slain it is murder.
5. **SAME.** *Same. Same.* Code, § 5088. This principle of the common law is not changed by force of the word "*escape*" used in the Code. It is not here used in its technical, but in its popular sense, which is to "*flee from,*" &c.
6. **SAME.** *Murder in the first degree. Premeditation.* The distinctive characteristic of murder in the first degree is *premeditation*. Premeditation involves a previously formed design, or actual intention to kill. But such design, or intention, may be conceived and deliberately formed in an instant. It is not necessary that it should have been conceived, or have pre-existed, in the mind any definite period of time anterior to its execution. The length of time is not of the essence of this constituent of the offence.
7. **SAME.** *Same. Mitigating circumstances. Commutation of punishment.* Code, § 5257. Section 5257 of the Code changes the rule by which the opinion of the jury finding mitigating circumstances was made obligatory on the Court; and leaves it, upon the recommendation of the jury, in the sound discretion of the Court, upon an unbi-

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ased and discriminating survey of the whole case, to give effect to that recommendation, or to refuse to do so, as the ends of public justice may seem to dictate.

FROM ANDERSON.

The plaintiffs in error were indicted and found guilty of murder in the first degree, before Judge BROWN. The jury found that there were mitigating circumstances, and recommended the prisoners to the mercy of the Court. His Honor, the Circuit Judge, refused to *commute* the punishment, and the prisoners appealed in error. After the opinion of the Court was delivered, the counsel for the prisoners presented a petition for a re-hearing. The principal grounds relied on in the petition will be found at the conclusion of the brief of the counsel. The Court refused the application for a re-hearing.

HEISKELL & TRIGG, for the plaintiffs in error, argued:*

1st. The juror John C. McKamey, having undergone the usual examination to test his competency, and the Court having decided that he was a competent juror, and put him to the prisoners, the right of the prisoners to elect or challenge the juror immediately attached; and it was error to withdraw him from them upon the suggestion of the Attorney General. The degree of the juror's intoxication, if he was so in fact, was not shown to be such as to render him incapable of attending to business, or performing the duties of a juror. It is evident that he could not have been much under the influence of ardent spirits, else the Court would have observed it in the original examination.

2d. The jurors Alfred Duncan, Alex. L. Galbreath, — Farmer, and Thomas Yarnell showed themselves clearly in-

* In consequence of the importance of this case, and the ability and zeal displayed by the counsel for the prisoners, I have felt it due them to insert their brief, and the reasons assigned for a re-hearing. REPORTER.

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competent, and should have been rejected. The jury have a most important duty to perform, having in their hands the life, or liberty of the prisoner; and it is not only desirable, but a matter of the highest importance, that they should, if possible, stand indifferent between the accused and the State. It is the constitutional right of the accused to be tried by an *impartial* jury, and the ordinary claims of humanity demand that prejudice—an unfit associate of justice—shall have no part in determining his fate. Why has the law provided that the accused shall be entitled to challenge, peremptorily, a certain number of jurors; and that, for certain existing causes, the jurors shall be rejected without being put to the accused? It is for the purpose of securing to the accused, if possible, what the common law, common sense, common justice, and the Constitution would all seem to demand—an impartial jury. It is not a matter of favor, but of right, that he shall have a panel of unprejudiced and impartial men by whom to be tried. If the jurors, or any of them, have formed or expressed an opinion as to the guilt or innocence of the accused, it is evident, they cannot be impartial; and if one or more who, on that account, would be incompetent, should be put to the accused, and he be compelled to challenge, the means provided by law to secure that object would become ineffectual. His having formed or expressed an opinion is what disqualifies the juror; for the law in such case presumes that there is partiality and prejudice operating on his mind. It is not contended that an opinion formed upon any data, no matter what, is sufficient to disqualify the juror; but, on the other hand, if the data upon which the opinion is formed be reasonable, and *relied* on as *true*, then the disqualification attaches; for in such case the prejudice exists; the juror, as it is expressed in some of the decisions of this Court, has “made up his mind,” and “will listen with more favor to that testimony which confirms, than to that which would change his opinion. It is not to be expected that he will weigh the testimony as well as one whose opinion is not made up in the case.” It is the character of the opinion formed in the mind, and not the source from which

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it is derived, that furnishes the test of the juror's competency. And so we understand the rule to be settled in the case of *Moses v. The State*, 10 Hum., 456. In delivering the opinion of the Court in that case, his Honor, Judge McKINNEY remarks, "that in testing the fitness or competency of a juror, the character of the impression made upon his mind, and the influence upon his conduct likely to be produced by it, are of much greater consequence than the source whence such impression may have been derived." In that case, the juror had formed an opinion from rumor, and did not know whether his information was derived from any of the witnesses or persons who knew the facts, but said he could do justice to the prisoner, if the proof turned out differently from rumor. The Court decided that the juror was not indifferent, and was, therefore, liable to challenge for cause, and reversed the judgment of the Court below. The case in 2 Swan, 585, does not conflict with this view.

A comparison of that case (in 10 Hum.) with the present, will disclose a great preponderance against the fitness or competency of at least two of the jurors mentioned above.

Alfred Duncan states explicitly that he had formed an opinion from rumor, and that he had heard persons tell over the circumstances of the case, and he believed them, and formed his opinion. It is true, he states, that those persons did not profess to know the facts except from information; and he (the juror) did not know whether they professed to state them from mere rumor, or by hearing them stated by some one who professed to know them. But the ignorance of the juror as to the source whence his informants derived their information cannot, surely, alter or change the *character* of the impression made upon his mind, if he believed in the truth of the information communicated to him, as he states he did.

This presents a very strong case, and of itself would seem sufficient to reverse this judgment, when tested by the ruling of this Court in the case referred to in 10 Hum. But the ruling of the Court below upon the competency of the juror, Thomas Yarnell, is, if such a thing be possible, more in con-

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fict with the rule established in such cases, than that before named, in reference to Duncan. Yarnell had made up an opinion in the case, from hearing men talk about it, who told him *the facts*—they talked like they believed what they said, and he *believed* what they said, and made up his opinion. Whether the men who told him *the facts* were witnesses, or persons who knew them, does not appear—nor is it material. It is enough that *the facts* were detailed to him, and he relied upon them as being true, and so formed his opinion. This statement of the juror discloses no “mere hypothetical opinion, or vague impression,” which may be easily removed by evidence; but it evinces a “positive and deliberate opinion, formed upon a rational ground of belief.” The rules established by this Court for testing the competency of jurors, embrace within their principles the cases above named, if not also that of the other jurors, Galbreath and Farmer. *McGowan v. The State*, 9 Yer., 192; *Moses v. The State*, 10 Hum., 456; *Moses v. The State*, 11 Hum., 232.

If, however, the exception to the jurors above named should not fall within the principles of the rules, or either of them, as established in the cases cited, their examination, at least, shows that it was doubtful whether they had formed such an opinion as would render them unfit to be jurors, and on that ground they should have been rejected. *Henry v. The State*, 4 Hum., 270.

3d. The Court erred in discharging the juror Landrum, after the panel had been made up, without an examination of him, or calling upon him for an explanation of his conduct. The parties making the affidavit upon which the Court acted, state that by nods, shaking of the head, &c., the juror made unmistakable signals to Warrick to refuse certain jurors tendered, and to accept others who were also tendered.

The purpose for which the nods, &c., were made by the juror might have been mistaken by the affiants, and upon an examination of the juror, and hearing his explanation of it, the Court might have become satisfied that they proceeded from no corrupt motive.

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But granting that the Court did right in discharging the juror, then we insist that the prisoners were entitled to their full number of challenges in the selection of another, and that the Court erred in refusing to allow that number to them.

In the case of *Garner v. The State*, 5 Yer., 160, one of the jurors became sick during the trial, and had to be withdrawn, and another was called in his place. The defendant insisted on his right of challenge, and did challenge the juror; but having exhausted his challenges in the first selection, the Court overruled his challenge, and directed the juror to be sworn. This Court decided that the Court below erred, and that the defendant was entitled to the whole number of challenges applicable to the offence.

In that case, the jury had been sworn; and in that respect it differs from the present case. But it is submitted that the reasoning in *Garner's* case will apply with equal force to the one under consideration.

In both cases the jury was *made up*, and that is the fact of importance in testing the application of the rule contended for on behalf of the plaintiffs in error in this case. Out of the number of jurors submitted to the prisoners, they had elected twelve to compose the jury by whom they were to be tried; and, so far as concerned the right of challenge in the prisoners, what conceivable difference could it make with them whether the panel thus elected was broken before or after they were sworn and charged with the cause? After the panel was made up, by the election of the prisoners from the list of jurors presented to them, the jury was, in law, impanelled; and was as much *the jury*, for the trial of the cause, before being sworn, as it was afterwards. And this being so, all the rights secured to the prisoners in the selection of that jury were, *functus officio*; and, *ipso facto*, the remaining jurors summoned and submitted to the prisoners, were discharged; and the challenges, if any remained to the prisoners, were *annulled*,—the ends for which they were originally allowed having been attained. Before the passage of the act of 1817, ch. 99, by the withdrawal of a juror during the trial, the

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panel was broken up, and an entire new selection had to be made. That act provides for the case of a juror too unwell to serve, and directs that another be summoned instantler, sworn, and the trial proceed *de novo*. But the act, as was decided in Garner's case, does not take away the right of challenge; and as the right remains, it remains to the whole extent.

It is to be observed that the act aforesaid only provides for the case of a juror who becomes too unwell to serve, and does not provide for any different proceeding than what existed before, when the panel should be broken by the discharge of a juror for any other cause. And although it might with reason be argued that a gap occasioned in the panel from any cause might, by analogy to the case provided for in the act, be supplied in the same way; yet the right of challenge, as it existed before the act was passed, remains intact, and the prisoners would be entitled to their full number.

The provision in the Code, sec. 4028—referred to in sec. 5218—is substantially the same with that provided by the act of 1817, ch. 99—and is the only case in criminal proceedings provided for by special legislation. In civil cases, the power is enlarged. Sec. 4007.

In the case now before the Court, the juror was not set aside for the cause mentioned in the statutes referred to, but upon a ground of incompetency discovered after his election by the prisoners; which, of course, is not embraced within the letter of said acts.

But it may be insisted that the juror was discharged before the prisoners had exhausted their challenges, and that upon the principles stated in the case of Garner, before mentioned—and also in the case of *Hines v. The State*, reported in 8 Hum., 597—it was competent for the Court so to discharge him, and to restrict the prisoners to their remaining challenges.

In the case of *Hines v. The State*, the Court say, that if the Court below "were arbitrarily to discharge a juror after he had been duly elected, without any sufficient reason for so doing, it would be error, and would entitle the defendant to a

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venire de novo." That is to say, that by such act of the Court, the whole proceeding would be vitiated, and have to be commenced anew.

But Hines' case does not settle the rights of the prisoner, in relation to his challenges, in the case of a juror withdrawn or discharged *after* the *jury* has been *made up*. The juror's incompetency, in that case, was discovered before he had even taken his seat upon the jury, and the ground of error insisted upon was very different from that we are considering.

And so far as Garner's case sheds any light upon this question, it is favorable to the view insisted upon by us, for in the opinion of the Judge delivering the opinion of the majority of the Court, it is said: "Admitting that there may be challenges, there is no mode of proportioning the number so as to meet the case of the particular juror or jurors withdrawn; it ceases to become a matter of calculation; and as the right remains, it remains to the whole extent."

But, if the rule be established, that when challenges remain to the defendant at the time the juror is withdrawn, that he is restricted to the number of challenges so remaining, still it could not be properly applied to the case before the Court. For the record shows that the prisoners challenged separately, that the juror in question had been the first elected, and that at the time he was discharged, the challenges of *one* of the prisoners had been *exhausted*. So that one of the plaintiffs in error, at the time the juror was withdrawn, had no right of challenge, and the effect of the ruling of the Court below, was to compel him to abide the election of the other party, and thus, in restoring the broken panel, he was wholly denied the right of challenge, and thereby "deprived of a very sacred right." If, in such case, the application of the rule would be proper, and the prisoner thus forced to submit his fate to the keeping of one juror, in whose selection he had no voice; so, upon the same reasoning, might he, by an act of the Court, be deprived of any number of the jurors selected by him, and in effect, wholly denied his challenges. To suppose that a majority of the jurors elected might be withdrawn by an act

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of the Court, is probably supposing an *extreme* case, but, the principle being the same, whether it be *one* or *eleven*, it serves to illustrate how great injustice may be done to the accused by the establishment of such a rule.

4th. It was error in the Court below to admit any evidence in relation to the passing, or offering to pass, counterfeit bills, by the plaintiffs in error, previous to the time when the bill of \$20 was offered to the witness, Laban Sharp, and for which the parties slain, Gibson and Queener, were attempting to arrest the prisoners at the time of the killing. And, also, in admitting the evidence of Thomas Bledsoe, in relation to the bills stated to have been found by him near to the place of the killing, and about one month after the killing took place.

5th. We insist on behalf of the plaintiffs in error, that his Honor has erred in several particulars in the charge which he delivered to the jury.

First: He charges, that "a killing not superinduced by passion, &c., deliberate and premeditated, is murder in the *first degree*, though *deliberated* and *premeditated*, but a *moment*." This part of the charge, and that on the following page, which declares, that "the law knows no specific time within which an *intent* to kill must be formed, so as to make the killing murder, &c.," seems to have been taken by his Honor from the case of *The State v. Anderson*, 2 Tenn., 6-9.

We submit, that his Honor, the Circuit Judge, has wholly misconceived the scope and bearing of the decision of this Honorable Court in that case. There the Court was distinguishing or defining the difference between murder and manslaughter, simply, and not between the grades of the former. "If the act," says the Court, "be accompanied by a *volition* or *intent* to kill, that implies *malice prepense*, and removes the very basis upon which manslaughter is founded."

It is the *intent* which accompanies the act, that generates the ingredient of *malice*, which is essential to constitute the act, murder; and it is that *intent* or *will*, the forming of which, the law knows no *specific time*; and if it be formed a *moment* antecedent to the act which causes the death, it will

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make the offence murder. But we submit that the *intent* to do an act, is one thing; and the *deliberation* and *premeditation* with which it is done, is another, and quite a different thing.

The Court below charged that the killing would be murder in the *first degree*, though *deliberated* and *premeditated*, but a moment. The terms deliberation and premeditation, imply reflection, a weighing in the mind and forming the design to kill, and considering the consequences, before the act by which death is produced, is performed. If the intent be formed, and the will accompany the act, though but a moment intervene, the law, as settled in the case of *The State v. Anderson*, makes the killing murder; but, to declare that deliberation and premeditation, but for a moment before the act is performed, would make it murder in the *first degree*, seems to us a manifest contradiction of the plain import and meaning of the terms, and an utter annihilation of all distinction between the grades of murder, as defined by the statute.

But after the jury had been considering the case, they returned into Court and asked for further instructions upon this point, and his Honor charged, that "*no time* was required, by the law, for the deliberation and premeditation necessary to constitute murder in the first degree, so that the purpose and intent to kill accompany the act." This part of the charge seems to us so manifestly erroneous, that the mere statement of it is sufficient. *Mitchell v. The State*, 5 Yer., 340; Judge Catron's opinion, 347.

Second: The Court erred in charging the jury, that "if the plaintiffs in error were making their escape, that is, leaving the jurisdiction of the Court, in order that they might not be arrested for the offence of passing counterfeit bills, that the sheriff had the right to arrest them on the charge without informing them of his authority, &c."

Section, 5038, of the Code, provides expressly, that "the officer shall inform him of his authority, and the cause of his arrest, &c., except when he is in the actual commission of the offence, or is pursued immediately after an *escape*." See, also, sec. 5040.

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We insist that the term "*escape*," is here used in its legal and technical sense, and if so, that the charge of his Honor is manifestly wrong, and must have misled the jury.

"An *escape*, is where one who is arrested gains his liberty before he is delivered by the course of the law." 1 Russell on Crimes, 416, 418.

Third : That part of the charge instructing the jury, "that in order to establish the counterfeiting by the defendants, it was competent for the State to show that they had counterfeited money in their possession, &c., before the alleged offering to pass counterfeit money to witness, Sharp, &c.," we think exceptionable, and calculated to mislead the jury, if it is not altogether erroneous in the way in which it is stated.

6th. The jury having found in their verdict that there were, in their opinion, mitigating circumstances, it was the duty of the Court, as we think, to commute the punishment to imprisonment, in the penitentiary, for life. Sec. 5257 of the Code, as we contend, made it obligatory upon the Court to commute, in accordance with the finding of the jury, and did not intend to leave it discretionary with the Court upon such finding. The section, 5257, is a substantial repetition of the act of 1838, which required the Court to commute the punishment upon a similar finding of the jury. The words *may* and *shall* have been held by this Court to be convertible terms. In the section preceding the one referred to, the power to commute in petit larceny, is expressly confided to the discretion of the Court, but it is not so in the case of murder.

7th. The verdict is not supported by the evidence.

The following, in substance, are the principal grounds presented in the petition for a rehearing of the cause :

The first point to which counsel ask attention, because the most important, arises on the following clause of the opinion of the Court. After stating the points arising upon the effect of the suspicion to justify the arrest, the Court say : " In this

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view, the evidence adduced to show that the note passed to Sharp was not a genuine note, and all of the collateral circumstantial evidence offered of finding counterfeit notes at the place of the homicide, and of the previous acts of passing counterfeit notes, for the purpose of showing guilty knowledge, and that a felony had in fact been committed by the prisoners, was unimportant, and may therefore be dismissed from our consideration of the case, together with the numerous and somewhat vexatious questions raised upon it, without any expression of opinion upon it."

Not to discuss the importance, in a legal point of view, of this evidence, as throwing light upon the *animus* of the prisoners—a point fully discussed at the bar, and, of course, considered by the Court—we will submit whether the decision of this question does not necessarily result in a reversal. Taking it as settled by the judgment of the Court, that this evidence is *unimportant* for the purpose of showing a guilty knowledge, it follows that it was not relevant for any purpose to the issue, and that it was error to admit it. Mr. Greenleaf (vol. 1, § 51.) says: "It is an established rule which we state as the first rule governing the production of evidence, that the evidence offered must correspond with the allegations, and be *confined to the point* in issue. (§ —.) This rule excludes all *evidence of collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, (see also § 448;) and the reason is, that such evidence tends to draw away the minds of the jury from the point in issue, and to *excite* prejudice and mislead; and, moreover, the adverse party having had no notice of such a course of evidence, is not prepared to rebut it. (§ 53.) In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and therefore their admission might seem, at first view, to constitute an exception to the rule. But these will be found to have been cases in which the knowledge or interest of the party was a *material fact*." He proceeds to instance cases of passing or possessing notes, &c., and facts relating to other notes, to show

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the *scienter*, and concludes: "cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it." The same rule is laid down in 2 Starkie's Ev., p. 381, § 4, title, Collateral Facts; see also *ib.*, 380. This rule, is stated in Wharton's Am. Cr. Law, ch. 2, pp. 299, 300, with many illustrations conclusive of this question. But these cases are still further illustrated by cases in Tennessee. In the case of *The State v. Shaw*, 3 Sneed p. 88, a witness was allowed to say that the prisoner "told him to notice where the man he borrowed from kept his money." This, the Court held, was error. "The evidence had no relation to the charge against the prisoner. But it is easy to see that it may have had a most prejudicial influence upon the minds of the jury," &c.

Where a prisoner, in the act of committing an offence, proposed to a witness the commission of other offences, it was held error to admit the evidence of such proposition, on the ground that "it is well settled that no proof of the admissions of one distinct, substantive offence shall be received upon a trial for the commission of another; a *fortiori* shall not statements of an intention to commit it. The only tendency of such testimony necessarily is to prejudice the minds of a jury, as it can by no possibility establish or elucidate the crime charged." *Kinchelow v. The State*, 5 Hum., p. 12. In *Stone v. The State*, the same principle is stated as unquestionable law. So, also, of the case of *Powers v. The State*, where the evidence was admitted as proper evidence on the ground that it was important to show the guilty knowledge; but it was held that, independent of that, it would have been error to admit it. The Court say: "Although, therefore, the gambling, as a *substantive transaction*, without any connection with the base coins, could not have been given in evidence, yet, as here introduced, it forms part of the transaction of passing the coins, and, as such, may be spoken of in detailing that transaction." 4 Hum., 274, 275.

The cases and authorities establish the major proposition that no evidence of substantive collateral transactions is ad-

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missible against a prisoner, unless it be material to show a guilty knowledge. The opinion of the Court shows that the evidence in this case is not material to establish a guilty knowledge. It follows that the evidence is not admissible, and a reversal is inevitable.

But counsel further respectfully submit, that the charge of the Court below ought not to be allowed to pass, as is done in this case, with an effort to reconcile it to the law, as more fully and correctly stated in this opinion. If the law had been stated, as it is in the concluding announcement of the summing up of it by this Court, it might have been unexceptionable. If the jury had been told that the question of vital importance was whether the minds of the prisoners were sufficiently free from excitement or passion to reflect and to act with cool deliberation of purpose, it certainly would have been a most important element of their inquiry, which was left entirely out of view in the statement made by the Court below. It *may* be, too, that, upon the construction given by this Court to the charge, it may be subject to but little criticism ; but the question is not whether it *admits* of a *proper construction*, so much as whether it is a clear and lucid statement of the law, which is not only correct in itself, but not likely to mislead the jury. It will not be denied that the distinctions are somewhat difficult to be comprehended and stated, even by trained legal men ; but by unlettered jurors it is exceedingly hard of comprehension.

This Court has said, in another case, that a prisoner is entitled to a *correct and distinct* expression of the law as to the several grades of offence involved in the charge of murder ; and it is not always safe to speculate as to the effect of error in this respect, or to assume that the prisoner was not injured thereby. *Quarles v. The State*, 1 Sneed, 410.

The counsel, in view of the importance of the principle involved, beg leave to add a word on the principle announced in this opinion. It is said that the new and distinctive characteristic of murder in the first degree, introduced by the act of 1829, is premeditation. Now is not this word

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the exact equivalent of *prepenae-aforethought*. Meditation beforehand and thought beforehand cannot be very wide apart in their signification. To think and to meditate are equivalent. But it is submitted that deliberation is the distinctive word, the new feature, and this is, in effect, admitted by the last clause on that point of the opinion, where the test is put clearly upon coolness and absence of excitement, so that the party is in a condition to *deliberate*. That word, derived from *libera*, the scales, to weigh, to consider in its relations and consequences, is surely the leading word in the act of 1829. And though the Courts of Pennsylvania have most manifestly repealed their act, from which ours is derived, we are not bound to follow, blindly, a bad precedent of judicial legislation, and hang our fellow-men, not upon the legislation of Tennessee, but the judicial usurpation of Pennsylvania. We do insist with the utmost confidence that *deliberation* is not the work of an instant. The intent may be formed in an instant; but unless it is formed upon *deliberation* which has taken place before the intent is adopted, the intent has not been meditated and deliberated so as to constitute murder in the first degree. All conclusions of the mind are finally resolved upon in an instant—at some moment of time—every intent is so formed; but the intent so adopted may have been hasty or it may have been deliberate. It is the former which the law intended to define as the lower grade of murder; the latter, murder in *cold blood*, which was to be punished with the highest penalty.

W. Y. C. HUMES, for the State.

HEAD, Attorney General, for the State.

McKINNEY, J., delivered the opinion of the Court.

The prisoners were jointly indicted in the Circuit Court of Campbell, for the killing of S. D. Queener and Travis Gibson.

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And at the July Term of the Circuit Court of Anderson—to which the venue was changed—they were jointly tried and convicted of murder in the first degree. The jury in their verdict expressed their opinion, that there were mitigating circumstances in the case; but the Court disregarded this expression of opinion, and pronounced judgment of death upon the prisoners; from which judgment they jointly appealed in error to this Court.

It is insisted that various errors exist in the proceedings and judgment, the more important of which will be considered.

1st. After the full number of jurors had been selected and placed in the jury-box, but before they were sworn, the Attorney General moved the Court to reject William D. Landrum, one of the twelve jurors, on the ground of his improper conduct, in the presence of the Court, after being chosen as a juror. It was fully proved, by the testimony of five members of the bar,—and the matter had, in part, attracted the attention of the Court,—that after Landrum (who was the first juror chosen by the prisoners) had taken his seat, he placed himself in such a position as that he could command the eye of one Warrick, the brother-in-law of the prisoners, who was seated in the bar by the counsel of the prisoners; and that during the progress of the selection of the other jurors, Landrum busied himself in indicating to Warrick, by motions of the head, and other significant modes, who to accept and to reject as jurors, as they were respectively put to the prisoners.

Upon this ground, the Court ordered that the name of Landrum be struck from the panel, and that he be discharged as a juror.

In making up the jury, the Attorney General had exhausted the challenges of the State; but there remained to the prisoners six peremptory challenges. And for the selection of another juror in the place of Landrum, the Court directed an additional list of *seven* jurors to be furnished, which was done. The prisoners exhausted their six challenges without choosing a juror; and, thereupon, one Partwood, who was tried and

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found qualified, was ordered by the Court to take his seat as a juror, in the stead of Landrum.

In this proceeding there is no error. The discretionary power of the Court to reject a juror, before being sworn, even in a capital case, for sufficient cause, cannot at this day be questioned. Nor can it admit of doubt, that the discretion was properly exercised in this instance. It would be a ridiculous mockery of justice to permit such an unfit person to act as a juror. All that can be justly said against the action of the Court is, that it did not go far enough. Such unabashed effrontery and corruption, acted out in the presence of the Court, should have been made an example of by the Court.

The position, that, upon the rejection of Landrum, the prisoners were entitled to a full panel of jurors, is wholly untenable. By the action of the Court, in rejecting the juror, they had lost no challenge; and the additional list of seven jurors, was all they had a right to demand.

2d. The murder was committed in the attempt to arrest the prisoners, for the alleged crime of *passing a counterfeit bank note*, to one Sharp. The persons slain were the sheriff of Campbell county and his deputy, who accompanied him as an assistant. The supposed felony was not committed in the presence of the officers; and in attempting to make the arrest, they acted without a warrant, and merely upon the charge made against the prisoners by Sharp.

The proof shows, that the killing took place on the third day of August, 1858. It appears that the prisoners staid at the house of Sharp, some five miles east of Jacksboro', the night preceding the murder. In the morning, Jesse Lewis handed to Sharp a twenty dollar bank note, purporting to be on the Bank of Hamburg, South Carolina, (which was believed to be a counterfeit note,) out of which to take their bill of \$1.25, and said *that* was the "least money he had." Sharp returned him the note, saying that he could not change it, but that he would go with them to Jacksboro' and get it changed for them; and, accordingly, started with them. On the way to town, the conduct of the prisoners was suspicious. They

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sometimes fell behind, and at other times rode before Sharp, conversing with each other in a low tone of voice. On reaching town, Sharp rode up to the house of one Cary, to consult with him in relation to the matter, and the prisoner, Jesse, followed him, and "said it was not worth while to go farther, that they had the change," and handed him the dollar and twenty-five cents. The prisoners then inquired where they could get liquor, and where they could get a horse shod. They were pointed to a grocery and blacksmith shop at the upper end of town, and they started in that direction.

Steps were instantly taken, by Sharp and some others, to procure a warrant for the arrest of the prisoners, for passing said counterfeit note. The Justice, however, declined to issue a warrant, for the reason that the christian names of the prisoners were not known. By this time it was discovered that the prisoners had not gone to the grocery or blacksmith shop; but, without stopping at all, had taken the road leading to Scott county, which crosses Cumberland mountain a short distance north of Jacksboro', riding at a pretty rapid gait. Queener and Gibson happened to be in town, and they were informed of all the facts, and were urged to pursue and arrest the prisoners. They accordingly set out in the pursuit, some twenty minutes or more after the prisoners left town, and overtook them on the mountain, some three miles from Jacksboro'. Queener and Gibson were both unarmed. All that is known of the circumstances of the attempted arrest, and the terrible tragedy that ensued, is gathered from the dying declarations of Queener, who lived for several hours after the mortal wound inflicted upon him by the prisoner, Jesse. Gibson died instantly.

The substance of Queener's statement is, that on overtaking the prisoners, he laid his hand on the shoulder of one of them, (Jesse,) and said to him, "I take you as a State's prisoner," and he had hardly got the words out, when the prisoner placed a pistol against his breast, and snapped it, and instantly shot again, as he, Queener, was in the act of getting off his horse, the ball taking fatal effect in his left breast. After

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being shot, however, he saw Gibson engaged with the other prisoner, some short distance below the road, and went to help him, and the prisoner, Jesse, followed after, and commenced "cutting;" that was the last he knew of Gibson. The proof shows that Gibson was fatally stabbed and cut in the neck; and Queener was also cut on the head, breast, and shoulders, in addition to the pistol wound.

It also appears from the proof, that about a month after the murder, a person passing near the place of the rencounter, found a parcel of counterfeit bank notes, amounting, in all, to \$175. These notes, and the facts connected with their finding, were admitted in evidence to the jury. The witness, Sharp, was also permitted to state, that, from appearances, he was of opinion that one of said notes was the note passed to him. To the admission of all this evidence respecting said notes, exception was taken.

The Court, also, admitted evidence of previous acts of passing counterfeit notes, by the prisoners, or one of them, at different times, more or less remote from the act of passing the note to Sharp, and purporting to be on various banks, without the notes being produced, or their loss accounted for, or notice to the prisoners to produce them. This evidence was, also, excepted to.

Upon the foregoing facts, several questions are raised. It is insisted that the attempted arrest of the prisoners was unauthorized and illegal; first, upon the ground that there was no sufficient evidence that any criminal offence had been committed; and, therefore, a homicide committed in resisting such arrest, could not be murder in the first degree.

This position assumes that the fact was not established, that the note passed to Sharp was really a counterfeit note. And this seems to have been regarded on all hands, in the Court below, as the main point in the case.

If the fact were to be admitted, that the note passed to Sharp was not shown to have been a counterfeit, and consequently, that no felony was committed, it would by no means follow that the arrest was unauthorized or illegal. Whatever

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doubt may have formerly existed on the subject, we understand the law to be now well settled, that a *peace officer* may make an arrest on a charge of felony, upon a reasonable cause of suspicion, without a warrant, although it should afterwards turn out that no felony had, in fact, been committed. 1 Russell on Crimes, (Am. Ed. of 1853,) 595, 596, 597; Wharton's Law of Homicide, ch. 5, p. 54. And this principle of the common law is distinctly incorporated in our Code, sec. 5037.

Such being the rule of law, there can be no doubt as to the authority of Queener and Gibson, upon the information communicated to them, to arrest the prisoners. The facts upon which they acted, in our opinion, furnished "a reasonable cause of suspicion" that a felony had been committed; and this was sufficient for their justification; they having acted in good faith, upon that belief, as the proof sufficiently establishes.

In this view, the evidence adduced to show that the note passed to Sharp was not a genuine note, and all the collateral circumstantial evidence offered—of the finding of counterfeit notes at the place of the homicide; and of previous acts of passing counterfeit notes by the prisoners—for the purpose of showing a guilty knowledge, and that a felony had, in fact, been committed by the prisoners, was unimportant; and may, therefore, be dismissed from our consideration of the case, together with the numerous and somewhat vexatious questions raised upon it, without any expression of opinion thereon.

It is insisted, secondly, that the arrest was illegal because the officer did not inform the prisoners of his authority, and the cause of the arrest, as is supposed to have been necessary by section 5038 of the Code.

This conclusion is not tenable for two reasons—the one of fact, the other of law. First: the extreme suddenness and ferocity of the murderous assault made upon the officer, denied him the opportunity of giving this information, if it had been requisite, under the circumstances, to have done so. But, in the second place, the law did not require that the officer should inform the prisoner of his authority, and the cause of the arrest, in a case like the present. The principle is settled, that,

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where a person is taken in the commission of an offence, or upon fresh pursuit afterwards, notice is not necessary; because, in either case, he must be supposed to know the cause of his arrest. 1 Russell on Crimes, 623; Wharton's American Law of Homicide, 60. And the exception in the Code, (sec. 5038,) in accordance with the common law, expressly dispenses with such notice, where the person "is in the actual commission of the offence, or is pursued immediately after the escape."

But it is argued that the common law principle is changed, by force of the word "escape," used in the Code. This is not so. The term "escape" is not to be taken in its technical sense, which would imply, as is argued, that the person was previously in custody of the officer, and had eluded his vigilance. It must be understood in its popular sense, which is, "to flee from, to avoid, to get out of the way," &c. This is placed beyond doubt, when we refer to section 5043—which provides for an arrest by a private person—in which, instead of the words, "is pursued immediately after an escape," the language used is, "or when arrested on pursuit."

3d. Exceptions are taken to the instructions of the Court. The only part of the charge which we consider necessary to notice, is the following: Upon the return of the jury for further instructions, "the Court charged, that *no time* was required by the law, for the deliberation and premeditation necessary to constitute murder in the first degree, so that the purpose and intent to kill, accompany the act."

This statement is supposed to be equivalent to saying, that *no intervening time* is required between the formation of the purpose to kill, and its execution. Such is not the fair construction of the charge. This would be absurd; for, the volition, or mental act of forming the purpose to kill, must, of necessity, precede the physical act by which the death is caused; but yet, the latter act may succeed the former so quickly, that there may be scarcely an appreciable pause, or intermission, between.

The distinctive characteristic of murder in the first degree,

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is premeditation. This element is superadded, by the statute, to the common law definition of murder. Premeditation involves a previously formed design, or actual intention to kill. But such design, or intention, may be conceived, and deliberately formed, in an instant. It is not necessary that it should have been conceived, or have pre-existed in the mind, any definite period of time anterior to its execution. It is sufficient that it preceded the assault, however short the interval. The length of time is not of the essence of this constituent of the offence. The purpose to kill is no less premeditated, in the legal sense of the term, if it were deliberately formed but a moment preceding the act by which the death is produced, than if it had been formed an hour before. The mental state of the assailant at the moment, rather than the length of time the act may have been premeditated, is the material point to be considered. The mental process, in the formation of the purpose to kill, may have been instantaneous; and the question of vital importance is—was the mind, at that moment, so far free from the influence of excitement, or passion, as to be capable of reflecting and acting with a sufficient degree of coolness and deliberation of purpose; and was the death of the person assaulted, the object sought to be accomplished—the end determined upon.) *Dale v. The State*, 10 Yer., 551; *Swan v. The State*, 4 Hum., 136; Bishop on Cr. L. secs. 628, 658, and cases referred to.

In this view of the law, that part of the charge excepted to is subject to but little criticism. All that can be said is, that the general expression, "no time," should have been qualified by adding, no *definite* time. But no prejudice or misapprehension could have resulted from this omission; for the principle had been twice fully and correctly stated in the preceding part of the charge.

4th. It is insisted that the Court erred in disregarding the finding of the jury, that there were mitigating circumstances in the case.

This has been, to us, the point of greatest difficulty in the case. It is argued, that the provision of the Code, (sec.

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5257,) should be held, in favor of life, to be imperative on the Court to commute the punishment; and not merely as conferring a discretionary power, that may or may not be exercised, as the Court may deem proper and just in view of the circumstances of each particular case.

The substance of the provision is, that in cases of conviction of a capital offence—where the jury in their verdict state that they are of opinion that there are mitigating circumstances in the case—“the Court *may*” commute the punishment from death to imprisonment for life in the penitentiary. This section of the Code is an almost literal re-enactment of one of the provisions of the act of 1838, ch. 29, with this important modification, that, by that act, it is expressly declared, that “*it shall be the duty of the Court*” to commute the punishment.

It is true that the word “may” is sometimes held to have the same sense, or to mean the same thing, as the word “shall,” and it will be so interpreted whenever the obvious reason or intention of a statute requires that it should be so understood. The general rule, however, is, that the words of a statute are to be taken in their natural and ordinary signification and import. 1 Kent’s Com., 462.

Is there, then, any ground on which it can be supposed that the framers of the Code intended that the word “may,” in the connection in which it is used in the section under consideration, should be understood in a sense different from its ordinary signification? We think not.

It will be observed, that the law on the subject of the commutation of punishment is materially changed by the Code, both as respects the executive and judicial departments of the government, as will be seen by comparing its several provisions with the statutes previously in force. The power vested in the Governor, by the Code, to grant “commutations,” is an *unqualified* and *discretionary* power, different from that formerly possessed. So the power given to the Courts to commute the punishment in cases of petit larceny, is, in express terms, a discretionary power—without the recommendation of the jury, as was formerly required. It is manifest that the au-

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thors of the Code, in revising the act of 1838, contemplated a change of the law. This is demonstrable from their dropping the imperative words of that act, and substituting language of a different import and signification. This conclusion is placed beyond doubt, by reference to sec. 41 of the Code, by which it is provided, among other things, that all public and general acts, passed prior to the session of the General Assembly of 1857-8, are repealed; consequently, the act of 1838, ch. 29, is repealed; and the only rule for our government, upon this subject, is that prescribed in sec. 5257 of the Code.

We are of opinion, therefore, that the object and intention of this section was to change the rule, by which the opinion of the jury was made obligatory on the Court; and to leave it in the sound discretion of the Court, upon an unbiassed and discriminating survey of the whole case, to give effect to the opinion of the jury, or to refuse to do so, as the ends of public justice might seem to dictate. And in view of the responsibility resting upon us, we cannot forbear to say, that, in our judgment, it was a wise and salutary change of the law, demanded by the highest considerations of public policy, and, regard for the lives of the community. Experience has fully shown, that such a discretion intrusted absolutely to juries, is subject to abuse; and that its exercise is sometimes so indiscriminate and improper, as to defeat, in some degree, the objects of criminal punishment. The present case is an illustration of the fact, that such an expression of opinion by the jury is only to be accounted for, in some instances, on the supposition of undue influence, or a false sympathy, or as a compromise.

As respects the sufficiency of the proof to support the conviction, there can be no reasonable doubt. From all the facts of the case, the conviction is forced upon the mind, that the prisoners had set out upon a course of crime, with the deliberate and desperate determination not to suffer themselves to be brought to justice; and that in pursuance of this resolution, the cruel and unmitigated murder of which they have been convicted, was committed.

There is no error in the judgment, and it will be affirmed.

John Kincaid v. William D. Sharp.

JOHN KINCAID v. WILLIAM D. SHARP.

1. **SURETY.** *Construction of secs. 3665 and 3666 of the Code. Surety of defendants embraced.* The remedy given to sureties by secs. 3665 and 3666 of the Code was designed to apply in favor of sureties, in all cases, irrespective of the attitude of the parties, as plaintiff or defendant. It applies as well in favor of the sureties of the defendant, in cases where, by statute, the defendant is required to give security, as of the plaintiff.
2. **SAME.** *Liability of principal and counter security.* The giving of counter security by a plaintiff or defendant, upon notice, does not exonerate the prior surety from any legal liability which had been fixed upon him before his discharge. He is only released from the payment of any costs that may thereafter accrue, with the further right to demand, that in case counter security has been given, the latter shall be *first* made liable to discharge the final judgment which may be rendered in the case.
3. **SAME.** *Same. Failure to give counter security. Forma pauperis.* If, in discharge of a rule made upon a plaintiff or defendant to give counter security, the party makes the proper affidavit, and is permitted to prosecute his suit in *forma pauperis*, the existing surety is only discharged from the payment of such costs as may thereafter accrue. He is not released from any pre-existing liability.
4. **SAME.** *Bond. Recognizance.* The statute directs that a bond shall be taken, but a recognizance, or bond of record, is of equal validity and effect. It is not essential that the recognizance shall contain a penalty. It is sufficient, if the undertaking of the surety be that the defendant will pay and satisfy whatever judgment the Court may render in the case. Unimportant omissions will, if necessary, be supplied by intendment of law.

FROM CAMPBELL.

Judgment was rendered at the September Term, 1859, TURLY, J., presiding, against Kincaid, the surety. He appealed.

MAYNARD and MINOTT, for the plaintiff in error.

NETHERLAND & HEISKELL, for the defendant in error.

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McKINNEY, J., delivered the opinion of the Court.

Sharp recovered judgment against one Hansly, before a justice of Campbell county, on a bill single for \$233, on the 30th of May, 1857. The case was removed into the Circuit Court, at the instance of Hansly, by *certiorari*, granted by two justices.

At the return term, Hansly was allowed to file an amended and supplemental petition, upon condition that he should give "good and sufficient security" during that term for the prosecution of the writ.

On the next day, Kincaid, the plaintiff in error, and four other persons, appeared and entered into a recognizance before the Court, which was spread upon the record, obligating themselves, that if the defendant, Hansly, were cast in this suit, "he shall pay all costs that may be awarded against him; and shall well and truly pay and satisfy whatever judgment the Court may render in this cause, or they, the said John Kincaid," (and four others by name,) "will do it for him."

At a subsequent term of the Court—Kincaid having given to Hansly the five days' notice required by law—it was ordered by the Court "that said defendant shall give counter security, on or before Friday, the tenth instant, or the said John Kincaid will be released from further liability as security, and defendant's petition dismissed."

Before the expiration of the time limited, the defendant disclosed to the Court by affidavit, that he was unable to give the counter security required by the rule made upon him, and asked to be permitted to prosecute the writ of *certiorari*, *in forma pauperis*; and having made the prescribed affidavit, he was allowed to do so. Thereupon it was ordered that the rule for counter security be discharged; and it was further ordered "that John Kincaid, the said security, be released from costs hereafter accruing." To all which proceedings there was no exception by either of the parties.

At a subsequent term the case was submitted to a jury, and a trial was had on the merits, which resulted in a verdict

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in favor of the plaintiff, affirming the justice's judgment. Whereupon the Court rendered judgment jointly against the defendant and said Kincaid, and his co-sureties in said recognizance, for the amount of the justice's judgment, with twelve and a half per cent. per annum thereon; together with the costs of suit, up to the day of Kincaid's discharge, and against the defendant alone for the residue of the costs. And from this judgment Kincaid appealed in error to this Court.

This proceeding to obtain counter security was instituted under the provision of the Code, sec. 3665, which is as follows: "Sureties for the *prosecution or defence of any suit in law or equity* in this State, may be released from such suretyship by giving five days' notice to the *plaintiff*, if in the State, and to his attorney, if out of the State, of his intention to move for a rule upon him, to give counter security to indemnify him against liability as such surety." The following section provides, that "upon notice thus given, the Court or justice shall make a rule requiring the *plaintiff*, within a given time, to give such counter security; and on failure of the *plaintiff* to comply with the rule, the Court will dismiss the suit, and give judgment against the *plaintiff* and his surety for the *costs* already accrued."

By sec. 3131, the clerk is required, before issuing writs of *certiorari* and *supersedeas*, to "take bond from the party applying, with good security, in double the amount of the judgment or error complained of, payable to the opposite party, conditioned to prosecute the writ with effect, or perform the judgment which shall be rendered in the cause." And by sec. 3137, it is provided that "upon affirmance of the judgment or decree below, or recovery of a larger amount, or upon dismissal of the *certiorari* for want of prosecution, or for any other cause, the Court shall enter up judgment for the amount recovered against the principal and the sureties to the prosecution bond, with interest at the rate of twelve and one-half per cent. per annum, from the date of the judgment or decree below, and all costs."

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We have cited these several sections of the Code because the questions arising upon this record involve their construction. It is supposed that sec. 3665, and the following section, do not apply to a case like the present; but only to the sureties of the *plaintiff* in any suit, and not to the sureties of the *defendant*. This provision is inartificially framed, and is incomplete and wanting in technical accuracy and precision; yet, without a departure from the established principles of construction, the defects may be supplied, so as to carry out the obvious intention of the Legislature. Section 3665, begins with the general provision, that the "sureties for the prosecution or *defence* of *any suit* in law or equity," may be released, &c. These words comprehend the present, and every other supposable case. And although, from the following words in this, and in sec. 3666, the remedy would seem to be restricted to the sureties of but one party, the plaintiff, yet, it is clear, that such was not the intention of the law. There can be no doubt that the remedy was designed to apply in favor of sureties in all cases, irrespective of the attitude of the parties, as plaintiff or defendant. In reason, the law ought to apply as well in favor of the sureties of the defendant, in cases where, by statute, the defendant is required to give security, as of the plaintiff; and it would have been not only unjust, but absurd, to have discriminated between them.

The omission of the word *defendant* must therefore be supplied, or the word *plaintiff* must be taken to mean the *actor* or *principal*, for whom the applicant surety is bound.

But it is further insisted, that conceding the remedy to be applicable to the sureties of the party defendant on the record, there is no authority given to subject the discharged surety to any liability whatever, except "for the *costs* already accrued." This, it is true, is the letter of the law, and it is another singular omission, but one which, we think, may be supplied, in view of the intention of the Legislature, by construing, in connection with this section, the sections before cited, (3131, 3137.) It must be taken to have been the intention of the Legislature, that, in either event, the Court should render such

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judgment as, under the circumstances, might be appropriate, and in accordance with the established rights of the parties. The objection resolves itself merely into this: that it was omitted to express that, which, from the whole scope and object of the law, is necessarily implied. If the *certiorari* had been dismissed for non-compliance with the rule, it will be conceded that judgment must have been rendered against the surety for the debt, as well as for the costs which had accrued, though this is not declared. And upon the same principle—though the rule may have been complied with—a like judgment must be rendered.

We cannot suppose, either from the letter or spirit of the law, that anything more was designed than to exonerate the surety thus discharged from *subsequent* liability. We are not to suppose that it was intended to absolve the discharged surety from any legal liability with which he had become fixed previous to his discharge. The liability of the surety, in the present case, was fixed by his recognizance; and from this—except as to costs accruing subsequent to his discharge—it was not intended to discharge him. The security which may be demanded by the surety, is “counter security to indemnify *him* against *his* liability as such surety.” And while it is true, that the giving of such counter security inures to the benefit of the adverse party in the suit, yet this was not the object of the law. It was, if possible, to save harmless the first surety. Hence, the effect of such counter security is not to discharge the previously fixed liability of the first surety. That remains as before. He is only relieved from future costs; with the further right to demand that, in case counter security has been given, the latter sureties shall be first made liable to discharge the final judgment which may be rendered in the case. But whether or not counter security be given, the first surety is unquestionably liable upon his bond, in the event the condition thereof shall not have been performed by his principal, except as to the costs of suit which may have accrued after the time of his discharge.

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The exceptions to the recognizance are not tenable. True, the statute directs that a "bond" shall be taken; but unquestionably an obligation of record, entered into before the Court, is, for all practical purposes, of at least equal validity and effect.

The recognizance does not, in express terms, bind the party to "prosecute the suit with effect;" nor is it, in terms, "to the opposite party." These omissions, however, under the modern practice of our Courts, are unimportant, and will be supplied, if necessary, by intendment of law. The objection that the recognizance contains no *penalty*, is alike untenable. The undertaking of the surety of record is, that the defendant will pay and satisfy whatever judgment the Court may render in the case; and this is in substantial compliance with the requirement of the law.

No question has been made as to the power of the Court to permit the defendant to further prosecute his *certiorari* without security.

By sec. 3133, it is provided that "no *supersedeas* shall issue upon application *in forma pauperis*, without express order of the Judge dispensing with security." The question, whether or not this was a proper case for dispensing with security, and whether or not the action of the Court in this case was equivalent to an express order of dispensation, not being made, will be left undetermined until properly presented.

Judgment affirmed.

The State v. Mary A. Willis.

THE STATE v. MARY A. WILLIS.

CRIMINAL LAW. *Indictment. Record of its being returned into Court.*
Amendment. Code, § 5242. In misdemeanors, the minutes of the Court should show that the indictments are returned into Court. But an omission to do so is not fatal. If brought to the notice of the Court, by motion to quash or otherwise, at the term the indictment is found, the defect should be supplied; if at a subsequent term, the entry should be made *nunc pro tunc*. By section 5242 of the Code, this objection is not available after verdict.

FROM CLAIBORNE.

The indictment was quashed at the September Term, 1859, PATTERSON, J., presiding. The State appealed.

HEAD, Attorney General, for the State.

THOMAS, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This is an appeal by the State from a judgment of the Circuit Court of Claiborne, quashing an indictment against the defendant for an assault and battery, upon the ground that there was no entry upon the minutes showing that the indictment had been returned into Court by the grand jury.

The motion was made at the next term after the indictment was found, and before trial.

The Court is not bound to quash an indictment or presentment at all, but may, at discretion, leave the party to demur or plead in abatement. Meigs' R., 192; 1 Chit. C. L., 299; 1 Dev. & Bat., 195.

But, perhaps, the Court may quash in a proper case without putting the defendant to his plea or demurrer for the same

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matter. Admitting that to be so, is the ground sufficient in this case?

In *Chappel v. The State*, 8 Yer., 166, a case of petit larceny, the Court arrested the judgment because there was no record evidence that the indictment had been returned into Court by the grand jury. In *Blevins v. The State*, Meigs' R., 82, in a case of assault and battery, the case is recognized as law, but it is said that it goes to the verge of the law, and is doubted in a note by the reporter. In *Henry v. The State*, 4 Hum., 272, the previous cases are "adhered to as the settled law of the Court." In all these cases, the objection was taken after the trial. By the act of 1852, carried into the Code, sec. 5242, the law on that point was changed, and the objection obviated after trial and conviction. The Legislature went no further than to provide for the cases decided by the Court. It has never been decided, that this omission of the clerk can be made available in any mode by a defendant before trial. The question is new in that aspect. The indictment is signed by the officer of the State, endorsed, "a true bill," by the foreman of the grand jury by his official signature, and is placed upon the docket for trial. It savors of form more than substance, to make it material that an entry should be made by the clerk, that it was returned into Court. How else could it be placed on the docket? But this should be done to make the record perfect. Yet, the difficulty may be removed by ordering an entry to be made upon the minutes at the time, if it be brought to the notice of the Court at the same term; but if at the following term, as in this case, instead of sustaining the motion to quash, the Court should order the entry to be made *nunc pro tunc*.

Let the judgment be reversed, and the cause remanded for trial.

Isaac H. Mayfield v. Charles M. McLary.

ISAAC H. MAYFIELD v. CHARLES M. McLARY.

STAY OF EXECUTION. *Acknowledgment of liability.* The acknowledgment of a supposed legal liability, when none exists, does not bind the party making such acknowledgment. Hence, if a person's name is entered as stayor, under circumstances that will not, legally, bind him, a subsequent admission of his liability will not preclude him from contesting the legality of the stay.

FROM POLK.

This cause was brought up to the Circuit Court by a writ of *certiorari*. The presiding Judge, GAUT, being of opinion that the stayor was liable, refused the motion to quash the execution, as to him. He appealed.

GAUT and HOYLE, for the plaintiff in error.

TREWHITT, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

On the 13th of June, 1857, McLary recovered judgment before a justice of Polk county against Susan Mayfield and others, for the sum of \$88.85; and the name of Isaac H. Mayfield, the plaintiff in error, was afterwards entered as *stayor*. The question is, whether he is legally liable as such, under the circumstances.

It was agreed, (as proved by the justice,) at the time of the trial, between the plaintiff and defendant in the suit, that security for the stay might be taken by the justice at any time during the week after judgment was rendered. Within the time limited, Benjamin Mayfield, the brother of the plaintiff in error, appeared before the justice and stated, that he was authorized to direct the justice to enter the name of said

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Isaac H. Mayfield, as stayor, but no written authority was produced, or alleged to exist. The justice declined doing so, but said that he, Benjamin Mayfield, might write his brother's name on the docket as stayor, on his own responsibility, which he did. The justice being in doubt, as to the legality of this proceeding, had an interview with Isaac H. Mayfield, on the subject, which took place *after the expiration of the week* limited for taking security for the stay, and at a place more than two miles from the justice's office; and in which conversation, upon being informed of what had been done, he said it was all right, and "acknowledged himself stayor;" and the justice states, "that he *afterwards accepted* and regarded him as the stayor."

On the foregoing facts, the Circuit Judge held that said Mayfield was legally bound as stayor, and refused to quash the execution. In this the Court erred. The act of Benjamin Mayfield, in writing the name of his brother, after the justice's refusal to do so, was simply a nullity. The assent of the justice to the doing of the act, was of no effect. No liability whatever, on the part of Isaac H. Mayfield, was thereby created. The subsequent acknowledgment of his liability, as stayor, by the plaintiff in error, is alike inoperative to bind him. The justice had no authority to take it, (upon the supposition that this was the inception of plaintiff's liability, as stayor,) because the period, limited by the agreement of the parties for staying execution, had expired. But, this objection aside, it is very clear, that the party's admission of a supposed legal liability, when none such really existed, is of no effect to bind him, in a case like the present.

Judgment reversed, and execution quashed.

Elijah Jones *et al.* v. Preston and William Swanson.

ELIJAH JONES *et al.* v. PRESTON AND WILLIAM SWANSON.

1. **STATUTE OF LIMITATIONS.** *What will arrest the running of the statute. Disability of heirs.* The fact that the heirs are under disability at the death of the ancestor, will not arrest the running of the statute of limitations, if the adverse possession commenced in his lifetime. To prevent the operation of the statute, suit must be instituted, and effectually prosecuted, within the time prescribed by law.
2. **SAME.** *Same. Abatement of suit pending at the death of the ancestor. Forcible entry and detainer.* An action of forcible entry and detainer instituted within seven years, and pending at the death of the ancestor, which is permitted to *abate* because it cannot be revived, or for other cause, will not affect the bar of the statute of limitations. To do this, the suit must be effectually prosecuted.

FROM HAWKINS.

In 1845, the defendants took possession of the land in controversy, under an assurance of title purporting to convey an *estate in fee*. Thos. Harmon, the ancestor of the plaintiffs, commenced an action of forcible entry and detainer against the defendants, in August, 1845. Pending said action, Harmon died. An application was made to revive the suit in the name of his administrators; but the Court refused the application. Subsequently, the Legislature passed an act, which it was thought authorized the revival of said suit; and it was accordingly revived in the name of Branch Tucker *et al.* This cause was taken to the Supreme Court, and was there dismissed. On the 1st of September, 1857, this action of ejectment was commenced by the heirs of Harmon. The cause was heard before Judge PATTERSON, on an agreed case, who gave judgment for the defendants, and the plaintiffs appealed.

HALL, for the plaintiffs.

HEISKELL, for the defendants.

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WRIGHT, J., delivered the opinion of the Court.

There can be no question that the judgment of the Circuit Court upon the agreed case was correct.

The defendants, and those under whom they claimed, had been in continued adverse possession of the land in dispute, claiming the same under deeds in fee simple, ever since August, 1845. If Thomas Harmon, the ancestor of the plaintiffs, ever had any valid title to this land, the cause of action, as to him, accrued when the adverse possession commenced—namely, in August, 1845—and he and his heirs were barred by force of the statute of limitations, in seven years from that time.

It can make no difference that he died before the bar had formed, leaving heirs who were under disability. The statute would continue to run against them, and they would be barred in the same time as Thomas Harmon, had he lived. This is well settled. The present action, brought by them on the 1st of September, 1857, was, therefore, too late.

The pendency of the action of forcible entry and detainer, brought by Thomas Harmon in his lifetime, and which abated upon his death, can be no answer to the statute of limitations in this case; because, by the express language of the statute, the suit, to have that effect, must be one *effectually prosecuted* against the person or persons in possession of the land. *Norment v. Smith*, 1 Hum., 46-48; *Norvell v. Gray's Lessee*, 1 Swan, 96-106.

Nor can it make any difference that the action of forcible entry and detainer was incapable of being revived, (*Tucker et al. v. Burns*, 2 Swan, 35) and that the heirs of Thomas Harmon, in order to test their title, were compelled to institute a new action. The statute makes no exception of such a case, and the Courts can make none.

It is unnecessary to consider what effect the third section of the act of 1819, ch. 28, would have had upon the case, if the present action, by the heirs of Thomas Harmon, had been instituted within one year after the abatement of the action

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of forcible entry and detainer by his death; and whether, on that state of facts, they could have claimed the benefit of the exceptions contained in that section; because the agreed case fails to show that this suit was commenced within one year after the death of Thomas Harmon; and if we are permitted to look into the facts of the case of forcible entry and detainer, as found reported in *Tucker et al. v. Burns*, 2 Swan, 35, as the agreed case seems to contemplate, it will appear that the present suit by the heirs of Thomas Harmon, was not brought until the expiration of nearly seven years after his death, and the abatement of the action of forcible entry and detainer. *Norment v. Smith*, 1 Hum., 46.

The judgment of the Circuit Court will be affirmed.

MOSES SWAN v. HANNAH W. SWAN.

ADMINISTRATION. *Who entitled to administer. County Court. Act of 1715.* The act of 1715, giving preference in the appointment of administrators, to the *next of kin*, is repealed by the Code, and the County Court is vested with the discretionary power to make the best selection, without restrictions. But, in cases where there are no children, or their descendants, preference will be given to the widow, if she is competent, since she is entitled to the whole of the personal estate after payment of the debts.

FROM KNOX.

This cause was heard upon appeal from the County Court, BROWN, J., presiding.

BAXTER & FLEMING, for the plaintiff in error.

Moses Swan v. Hannah W. Swan.

CROZIER & REESE, and HUMES, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This is a contest for the administration, between the widow and brother of Wm. Swan, who died intestate, in Knox county, in November last, without children, commenced in the County Court, where the widow prevailed, and the judgment was affirmed in the Circuit Court, from which the case is brought, by appeal, to this Court.

The act of 1715, Car. and Nich., 72, gave the right of administration to the "next of kin." In Mar. & Yer. R., 42, it was held that where application was made by both the next of kin and the widow, the Court might use its discretion in the selection. This was in conformity to the power of the Ordinary in England, under the statute of Henry the Eighth. This Court, in the case of *Wilson v. Frazier*, 2 Hum., 31, leaves the question undecided, whether the act of 1715, deprives the widow of an equal right with next of kin, to administration under the act of Henry the Eighth, but holds that the wife, as such, is not next of kin. But that case does not settle the question either way, but disposes of the case against the widow, upon the ground that she made no contest in the County Court, where the application must originate, otherwise the higher Courts have no jurisdiction. So the question remains undecided under the act of 1715, and it is unnecessary now to speculate upon it, as that act is no longer in existence, except so far as it is adopted in the Code, ch. 2, art. 1, p. 445. That omits the part of the old act which gives a preference to the next of kin, and vests the County Court with the discretionary power to make the best selection, without restrictions. That is certainly an improvement, as the next of kin may, in many cases, be entirely incompetent to perform the duties of administrator.

But there is no room for speculation on the subject, as by the 41st section of the Code, "all public and general acts" passed prior to the session at which the Code was adopted,

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are expressly repealed. So, there is now no statute giving a preference to the next of kin, the widow, or anybody else. Whether the statute of Henry the Eighth would now apply, and confine the discretion of the County Court to a selection between the widow and next of kin, when they apply for it, we need not now consider, as, if that be so, still this appointment would be valid under either view.

But there is a particular propriety in giving the preference to the widow, in cases where there are no children, or descendants, as, since the act of 1844, she is entitled to the whole of the personal estate, after the payment of the debts.

Let the judgment be affirmed.

THE STATE v. ISAAC RUSSELL.

ROADS. *Minor may be compelled to serve as overseer. Code, § 1195.* It is the duty of the County Court, annually, to appoint overseers of the public roads; but no qualifications as respects age, or otherwise, are prescribed. The overseer must be subject to road duty, and must also be one of the hands assigned to work on the road over which he is appointed; but there is no legal objection to the appointment of one who is under the age of twenty-one years; and if a minor is appointed, he is subject to all the "pains and penalties" imposed by law for refusing to serve and for neglect of duty.

FROM SEVIER.

This cause was tried in the Circuit Court of Sevier county, Judge TURLEY presiding. The defendant was acquitted, and the State appealed.

HEAD, Attorney General, for the State.

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RAMSEY, for the defendant.

MCKINNEY, J., delivered the opinion of the Court.

The defendant was tried, at the November Term, 1858, of the Circuit Court of Sevier county, upon a presentment against him as overseer of a public road, for neglecting to keep said road in repair.

A special verdict was returned by the jury, finding that the road was out of repair as charged in the presentment; and likewise finding, that the defendant, at the time of his appointment as overseer, and also at the time said presentment was made, was over the age of eighteen, but under the age of twenty-one years; and referring the question of law to the Court, whether, by reason of his *minority*, the defendant was liable to serve as overseer, or subject to prosecution for his failure to perform the duties enjoined upon overseers? If so, they found him guilty; if not, then, they found him not guilty.

Upon this verdict the Court discharged the defendant, and the Attorney General, on behalf of the State, prosecuted an appeal in error to this Court.

The simple question is, whether a person under the age of twenty-one years, is subject to be appointed an overseer?

We think he is. By sec. 1195, of the Code, all free persons, not under the age of eighteen, nor over forty-five, (unless within some one of the exceptions therein stated,) are bound to work on the public roads. The County Court is required to make annual appointments of overseers of the public roads: but no qualifications, as respects age or otherwise, are prescribed. The overseer must, of course, be a person subject to road duty; and he must likewise be one of the number of persons assigned to work on the particular road. And we perceive no valid objection, in law, to the appointment of any one as overseer, who, by law, is subject to work on the road. There may be obvious prudential reasons for declining to appoint a person of immature years to fill the place of

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an overseer; but this is a matter intrusted to the discretion of the appointing power.

It is certainly no legal objection to the appointment of a person, under the age of twenty-one, that an overseer is subject to "pains and penalties" for refusing to serve, and for neglect of duty. If he could claim exemption from service, as overseer, on the ground of his *minority*, for the same reason he might claim to be exempt from road duty altogether, as well as from other public duties and burthens imposed by law on minors as well as adults.

The rule of the common law, which secures to persons under the age of twenty-one years certain privileges and exemptions, is a rule of expediency, subject to be modified or changed, at the pleasure of the Legislature, as public policy may seem to require. Public duties are, and may be enjoined upon minors by positive law, and their observance enforced by forfeitures or penalties; and, in such cases, the minority of the person furnishes no ground of defence. To this extent, the disability, as well as the protection of the common law rule, is removed, and, for the particular purpose, the minor is constituted a person *sui juris*, and is amenable as such.

And even at the common law, duties and trusts may be imposed on minors; against liability for the due performance of which, non-age constitutes no ground of defence.

The judgment will be reversed, and judgment will be here rendered on the verdict, for a fine of five dollars, and costs of the prosecution.

WILLIAM BARTON v. WILLIAM TRENT, FOR THE USE OF COPE.

1. WITNESS. Evidence. When a party to the record competent. Code, § 3810. Prior to the adoption of the Code, a party to the record, although not interested, was an incompetent witness. This general

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principle is so far changed by section 3810 of the Code, as to render a person a competent witness, although his name is used as a party on the record, if he has no legal interest in the subject matter of the suit. But if he is interested in the subject matter, he is incompetent, not only upon general principles, but under the provisions of the Code.

2. *SAME. Same. Same. Bills and notes. Transfer by delivery. Liability of payee.* If the payee of a note transfer the same by delivery, without indorsement, there is an implied warranty that the note is not forged or fictitious; and if its genuineness is put in issue by the plea of *non est factum*, the payee and his wife are incompetent witnesses. In the absence of fraud or a special undertaking, the payee is not liable, if the maker of the note prove to be insolvent.
3. *DEPOSITIONS. Exceptions to. Practice.* A general objection, to the competency of evidence in a deposition, made on the trial, will be available, although no exception is taken to the evidence at the time the deposition is taken.

FROM HAWKINS.

Verdict and judgment for the plaintiff, before Judge PATTERSON. The defendant appealed.

M. T. & L. C. HAYNES, for the plaintiff in error.

NETHERLAND & HEISKELL, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt upon a note under seal, alleged to have been executed by Barton to Trent, and by the latter transferred, by delivery, to Cope. The suit was instituted in the name of Trent, the payee, for Cope's use. The defendant pleaded the general plea of *non est factum*. Verdict and judgment were for the plaintiff, and the case is brought here by an appeal in error.

On the trial, the deposition of William Trent, the payee, and nominal plaintiff on the record, was offered as evidence for the plaintiff, to disprove the plea of *non est factum*, which

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was the only defence relied on; and the deposition of Margaret Trent, wife of said William Trent, was also offered as evidence for the plaintiff. To the reading of these depositions as evidence to the jury, a general objection was urged by the defendant—not specifying the ground of exception. This objection was overruled, and the evidence was admitted. In this, it is alleged the Court erred.

Prior to the adoption of the Code, it was settled by repeated adjudications of this Court, that the party in whose name a suit was brought for the use of another, could not be a witness in favor of the beneficiary. 7 Yer., 297; 6 Hum., 405; 9 Yer., 480. But it is insisted that this rule is abrogated by sec. 3810 of the Code, which is as follows: "A nominal plaintiff, or naked trustee, shall not be incompetent as a witness on account of his being a party to the record." The meaning of this provision is obvious enough. The intention was simply this, that a person having no legal interest in the subject matter of the suit, should not be held incompetent as a witness on the mere technical and abstract ground of his name being used as a party on the record.

If this be a correct exposition of the provision of the Code, the objection to the competency of Trent, the payee in the note, is not obviated thereby. This is obvious from the very nature of the issue made in the case, which impeaches the genuineness of the note sued on.

It is certainly true, that a party who transfers a note to another by mere delivery, without indorsement, is not liable—in the absence of fraud or special undertaking—though the note turn out to be of no value, by reason of the insolvency of the maker. But although he does not, in general, warrant the solvency of the maker of the note, yet it is well settled that he does warrant that the note is not forged or fictitious. Byles on Bills, (4th Am. ed.) 224, 227, top; Story on Prom. Notes, sec. 118.

It is true that this is merely an implied warranty; still, it is of no less force than if it were express.

Inasmuch, then, as the genuineness of the note is directly

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in issue by the defendant's plea of *non est factum*; and as Trent would be liable on his implied warranty, in the event of the plaintiff's failure to recover, it is clear that he is incompetent, on the ground of interest, as well upon general principles, as under the provision of the Code.

It is true, that, by the terms of the transfer, Trent might have exempted himself from this liability which the law casts upon him, but this he neglected to do. The incompetency might also have been removed by a release from the plaintiff; but no such release was given. The mere statement of Trent, in his deposition, that he has no interest in the event of the suit, goes for nothing except to show his ignorance of the legal liability resting upon him.

But it is urged by the defendant in error, that the question of the competency of Trent, cannot be considered as properly arising under our practice—the objection to the deposition being general.

The deposition was taken without cross-examination. There was no exception taken until the deposition was offered in evidence on the trial, when, as appears from the bill of exceptions, the defendant “excepted to the reading of the deposition.”

By the uniform course of decision of this Court, an objection to the *competency* of a witness is available upon a general exception to his deposition. 10 Hum., 16; 1 Swan, 57; Id. 333; 2 Sneed, 637, 645.

And the omission to except to the *competency* of the witness, at the time of taking the deposition, does not preclude the party from doing so at the trial.

It is scarcely necessary to observe, that Trent being incompetent as a witness, his wife was equally so.

The judgment will be reversed, and the case remanded for a new trial.

John R. Moore and Wife, *Ex parte*.

JOHN R. MOORE AND WIFE, *Ex parte*.**SALE OF LAND. Conversion of. Husband. Descent and distribution.**

A sale of land under a decree of Court, is complete upon confirmation of the report of sale, and *not before*. This action of the Court is necessary, to change the character of the property from realty to personalty; and if a *feme covert*, owning real estate, which has thus been sold, dies before the confirmation of the sale, *without issue*, the proceeds of the land go to her brothers and sisters; and not to her husband. Otherwise, if the sale had been confirmed and the *conversion* rendered *complete*.

FROM GREENE.

The Court below, Judge PATTERSON presiding, pronounced a decree in favor of the husband; and the cause was brought up by appeal. The facts are stated in the opinion of the Court.

MILLIGAN, for the petitioners.

CARUTHERS, J., delivered the opinion of the Court.

The petitioners are the heirs of Sebert Jewel, who died in Greene county, intestate, leaving real estate, which was sold in this proceeding for partition. A house and lots in Greenville were sold by the commissioner on the 3d of May, 1858, under a decree made at the February Term of the Circuit Court. The sale was reported to the June Term, and then confirmed. Between the sale and the confirmation, Elizabeth Biggs, wife of Elbert Biggs, died without issue. Upon this state of facts, the question arose, and is now presented to us, whether the husband, as administrator, or the brothers and sisters of Elizabeth, take her share of the proceeds. The Circuit Judge decided in favor of the husband.

John B. Moore and Wife, *Exparte*.

If the conversion of the realty into personalty was complete at the time of her death, this would certainly be correct. In that case, the property of the wife would be a *chose in action*, and not realty, and would, consequently, go to the husband as such, upon administration on her estate. In *Jones v. Walkup*, 5 Sneed, 137, this was held to be so, where the land of the wife had been sold under a proceeding of this kind, and the sale *confirmed*, though the notes for the consideration had not been collected at the time of her death. We held, in that case, as we have in all aspects of the question which have come before us, that these sales were complete upon the confirmation of the report of sale, and *not before*. This act of the Court is necessary to change the character of the property from realty to personalty, and without it, the rights of all parties, as to the proceeds, would remain as if there had been no sale. If, then, the mutation of the realty into personalty, had not been accomplished by what had occurred at the time of the wife's death, the marital right could not attach, and the proceeds would go to the heirs of the wife, as the land would have done in case no sale had been made. The case of *Jones v. Walkup*, before referred to, and the authorities there cited, though upon a different aspect of the question, is, in its principle, conclusive of this case. In that case, we say, in relation to the necessity and effect of confirmation: "This act of the Court completes the contract, and the nature of the property and rights of the parties are instantly changed. The purchaser is then entitled to the land, and the former owner the money. *It is different before confirmation, because the sale is incomplete.*" The proposition in this case is the converse of that, and if we were right then, we must be now. If the confirmation by the Court be indispensable to work the change in the nature of the property and the rights of the parties, it must necessarily follow, that before, and without this, there is no such change.

So we hold, that, at the death of Elizabeth, although her land had been sold, yet, as the sale was not completed by *confirmation*, the conversion had not taken place, and, therefore,

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her interest in the proceeds of the sale goes to her heirs at law, being her brothers and sisters, as she had no issue, and not to her surviving husband.

The judgment in favor of the right of the husband is therefore reversed, and the case remanded.

RICHARD J. WILKINS v. W. D. MAY *et al.*

1. **CHANCERY PRACTICE.** *When the answer simply makes up an issue.* If an answer in Chancery is founded, merely on information, it has no other effect than to make up an issue between the parties; and, in such case, the weight of evidence controls the determination of the issue.
2. **SALE OF REAL ESTATE.** *Registration. Execution.* As between the parties to a deed the title passes without registration; and the vendee of land under an unregistered deed, has such an *inchoate* legal title as subjects the land to execution at law for his debts.
3. **SAME.** *Same. Recognizance. Lien.* This being so, the *lien* of a recognizance entered into by the vendee would bind the land, and a sale made under a judgment upon the recognizance would vest a valid legal title in the purchaser.
4. **ESTOPPEL.** *What amounts to. When it operates upon heirs.* If the owner of land has knowledge of the fact, that another assumes to be owner of the same, and as such enters into a recognizance, creating a lien on the land in favor of the State; and makes no objection thereto, both parties, as well as their heirs, would be *estopped*, as against the purchaser who acquired the title under such *lien*.

FROM KNOX.

The bill was dismissed by Chancellor LUCKY. The complainants appealed.

T. C. LYON, for the complainant.

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TRIGG, TEMPLE and HALL, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This bill was filed to enjoin the prosecution of an action of ejectment, brought by the defendants against the complainant, for the recovery of a tract of land lying in Knox county.

It appears that the complainant purchased said land at execution sale, on the 20th of June, 1838, and that it was conveyed to him shortly thereafter, by a deed from the sheriff; and that he has been in possession thereof ever since the date of his purchase.

The land was sold by the sheriff, as the property of the defendant, William Clark, who had been in possession of the same for about twelve years preceding said sale, claiming to hold, as is alleged in the bill, under a purchase from his brother, Hugh M. Clark. The bill charges, that said William Clark paid his brother for said land, and received a deed of conveyance from him for the same; but said deed appears not to have been registered, and cannot be found.

William Clark removed beyond the limits of this State, about the time of said execution sale. Hugh M. Clark died in 1837, prior to the sale, leaving the defendants, Caroline and Margaret, his only heirs at law, both of whom were then minors.

It further appears, that at the June Term of the Circuit Court of Knox, 1837, the defendant, William Clark, entered into a recognizance before said Court, in the penalty of \$1500, for the appearance of his son-in-law, who stood indicted upon a charge of *forgery*. This recognizance was forfeited; and judgment was entered up for the penalty, at the following October Term of said Court. Upon this judgment, said tract of land was sold by the sheriff, and purchased by the complainant, as above stated.

The proof shows, that before entering into said recognizance, the defendant, William Clark, was sworn, and interrogated by the Court; and in answer to the interrogatories, he

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declared on his oath, that he owned said tract of land; that he had "a good deed" for it, and that it was free from incumbrance.

The bill charges, that said Hugh M. Clark was present in Court, and heard the foregoing statement of William Clark; and the proof tends to support this allegation. It is expressly proved, that he was in Knoxville on that day; and, on his return home in the evening, he conversed with the witness, Steele, in regard to William Clark's declaration on oath, in response to the inquiry of the Court, that he was the owner of said tract of land; and evinced a knowledge of all that had taken place in the Court, in reference to that matter. And, in the same conversation, he further stated, that William Clark "had paid him up" for said land. The proof likewise establishes, that about the year 1826, William Clark paid to his brother Hugh M., a horse beast, and two hundred and fifty or three hundred dollars in money, for said land, and that a deed was executed by Hugh M. to William, for the same. The declarations of both Hugh and William, that the land belonged to the latter, are proved to have been made at a period anterior to the execution sale. It would seem, however, from the statements of William, that he was in debt; and it is highly probable, from his own declarations, that, for that reason, his deed was not registered.

In 1850, the heirs of Hugh M. Clark, finding that there was no conveyance of record from their ancestor to William Clark for said land, set up claim to the same, and brought an action of ejectment for its recovery.

To enjoin this action, and to have the legal title divested out of said heirs, this bill was filed.

We are of opinion, that the Chancellor erred in dismissing the bill. The answers of the defendants, being founded on information merely, have no other effect than to make up an issue between the parties. The weight of the evidence sufficiently establishes, in our judgment, that the land was purchased and paid for by William Clark, some ten or twelve years prior to the execution sale; and that the same was, in

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fact, conveyed by Hugh M. to William, about the time of the purchase. These facts being established, it matters not that the deed was omitted to be registered. As between the parties, registration of the deed was unimportant. The legal title passed from Hugh M. Clark by the execution of the deed; and though the deed was never registered, yet, between him and his vendee, the divestiture of title was as complete as if registration had taken place. In this view, the case is a plain one for the relief sought by the bill. It is well settled, that the vendee of land, under an unregistered deed, has such an *inchoate* legal title, as subjects the land to execution at law for his debts. And if this be so, *a fortiori* would the lien of a recognizance entered into by him, bind the land thus held. But, again, if Hugh M. Clark were present, and had knowledge of the fact—as can scarcely be regarded doubtful—that William Clark assumed to be owner of the land, and as such, by his recognizance, created a lien thereon in favor of the State; the former, no less than the latter, would be estopped, as against the complainant, who acquired title under such lien, to set up claim to the land; and of course the estoppel would operate equally upon his heirs.

Upon the whole case, we are of opinion that the complainant is entitled to a decree. The decree of the Chancellor will, therefore, be reversed.

JANE RHEA v. MATTHEW ALLISON et al.

1. IMPROVEMENTS. *Void sale. Lien. Rents.* If a party is put in possession of land by the owner, upon an invalid sale, which the owner fails or refuses to complete; and, in the expectation of the performance of the contract, pays the purchase money, and makes improvements, a Court of Equity will *directly* and *actively*, upon a bill filed against the owner for an account, make restoration of the pur-

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chase money, and compensation to the full value of all the improvements to the extent they have enhanced the value of the land, deducting rents and profits; and will hold the land as subject to a *lien* therefor.

2. **SAME.** *Same. When the lien attaches. Notice.* This equity exists so soon as the purchase money is paid, or the improvements are made, and attaches itself upon the land; and becomes operative against the owner, or a purchaser from him with notice, actual or constructive.
3. **LIEN.** *Improvements. Prior equity. Removal of incumbrance.* If such owner had purchased the land, and a part of the purchase money remained due, and was a lien upon the same, and his second vendee had removed said incumbrance by discharging the vendor's lien, to that extent he would have priority, and his lien would be superior to that of the first vendee under the invalid sale.
4. **INNOCENT PURCHASER.** *How this defence to be made. Answer.* An answer relying upon the defence of an innocent purchaser, must contain all the certainty of a plea. The defendant must aver that his vendor was *seized in fee*, or pretended to be *seized in fee, &c.*
5. **SAME.** *Transfer in due course of trade. Consideration. Endorser and endorsee.* The suspension or satisfaction of a precedent debt is not a sufficient consideration to give the endorsee of a bill or note the position of a *bona fide innocent purchaser*, as against the equity of a third party, enforceable against the endorser. Such endorsee parts with nothing, sustains no loss, and incurs no liability by reason of the endorsement.
6. **SAME.** *Same. Same. Applicable to real estate.* The conveyance of land, in payment of an antecedent debt, does not put the conveyee in the position of a purchaser for value, nor entitle him to the protection of a Court of Equity.

FROM KNOX.

The complainant purchased from Williams an unimproved lot, in Knoxville, at the price of \$400. She paid \$60 in cash. The purchase was by parol; but the complainant took possession of the lot, and proceeded to make valuable improvements thereon. Williams afterwards conveyed the same lot to Allison, who instituted an action of ejectment against the complainant to recover the premises. This bill was filed enjoining the action at law, and seeking an account for im-

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provements and the purchase money paid; and asked that the same be declared a *lien* upon the lot. Chancellor LUCKY dismissed the bill. The complainant appealed.

T. C. LYON and JAS. R. COCKE, for the complainant.

CROZIER & REESE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

It is settled, in this State, that where a man is put in possession of land by the owner, upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract, makes improvements, a Court of Equity will *directly* and *actively*, upon a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor. *Herring & Bird v. Pollard's Ex'rs*, 4 Hum., 362; *Humphreys v. Holtsinger*, 3 Sneed, 228-230. The same rule must apply to purchase money paid upon the faith of the contract.

These decisions go beyond the doctrine of the English Courts, which only allowed the value of the improvements, upon the ground, either that there was some fraud, or where the aid of a Court of Equity was *actively* sought by the owner to get possession of the estate. 2 Story's Eq., § 1238. Judge Story, and other law writers, speak of it as an implied trust, or lien *upon the estate itself*; while, in other authorities, it is called an *equity*. This equity exists so soon as the improvements are made—attaches itself upon the land—and becomes operative against the owner, or a purchaser from him with notice, actual or constructive.

In such a case, the party making the improvements having acted *bona fide* and innocently, the owner, who has received a

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substantial benefit, ought, *ex æquo et bono*, to pay for such benefit. 2 Story's Eq., secs. 1236-1237.

In this case, aside from the proof, we think we are warranted in the assumption, that complainant made the improvements upon the lot in question under the verbal sale from M. W. Williams, as stated in *her* bill. The answer of the defendant, Allison—if not to be taken as a direct admission—is too faint in its denials to call for proof on the part of the complainant.

The only question then is, whether he had notice of her equity? And as to this—if we disregard the evidence filed, for which we see no reason—there can still be no question upon his answer. He took the lot of Williams in payment of a pre-existing debt. And besides, his answer—if he mean to rely upon the defence of an innocent purchaser—should have contained all the certainty of a plea. And, in this respect, it is fatally defective. It does not aver that Williams, of whom he claims to have purchased, was seized in fee, or pretended to be so seized, and was in possession of the lot at the time when he executed the purchase deed, though, as stated in the answer, the conveyance purported an immediate transfer of the possession. And we apprehend that no such averment could, in truth, have been made. This answer, in many other essential particulars, wants the ingredients of such a plea. Story's Eq. Pl., sec. 805; *High v. Batte*, 10 Yer., 335; 1 Meigs' Dig., 244-5.

In Tennessee, upon questions connected with commercial paper, it is settled that the suspension or satisfaction of a precedent debt is not a sufficient consideration to give the endorsee of a bill or note the position of a *bona fide* innocent purchaser, as against the equity of a third party, enforcible against the endorser. The reason given is, that where a party receives a note or bill for a pre-existing debt, due from the person only who assigns the note or bill, he parts with nothing. He has given for it neither his money, goods, or credit; nor has he, on account of it, sustained a loss, or incurred any liability. *Wormley v. Lowry*, 1 Hum., 468; *Van Wyck v.*

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Norvell et al., 2 Hum., 192. The same rule obtains in the State of New York. And in *Dickson v. Tillinghast*, 4 Paige, 215, this doctrine was applied to the law of real estate, and it was decided that the conveyance of land in payment of an antecedent debt, does not put the grantee in the position of a purchaser for value, nor entitle him to the protection of a Court of Equity. And if any distinction, as to this question, could exist between the two species of property, we suppose it to be in favor of the purchaser of commercial paper. A contrary rule is laid down in most of the States, and by the Supreme Court of the United States, in *Swift v. Tyson*, 16 Pet., 1. In that case, Judge Story even goes so far, in favor of commercial paper, as to hold that receiving it *as security for a pre-existing debt, is in the usual course of trade*. But, as we have seen, this is not the rule in our State, and it seems too well settled to be questioned. The whole subject is examined in the notes to *Basset v. Nosworthy*, 2 White and Tudor's Cases in Equity, at pages 103 to 121.

But it is unnecessary for us here, conclusively, to dispose of this question. It is enough that in this case the defendant, Allison, has furnished no proof that he is either a creditor or purchaser from Williams. He has shown no pre-existing debt, and has no evidence even that he took a deed from Deadrick and wife, nor the reason for so doing. No interrogatories are put to him in the bill, so as to make him a witness, or entitle his answer to be evidence for him; and it was certainly incumbent upon him to make out his defence as a purchaser, by proof. Notes to *Basset v. Nosworthy*, 120 and 121; *Napier v. Elam*, 6 Yer., 108-118.

If it be true, as defendant, Allison, states in his answer, that Williams had purchased the lot of Deadrick and wife, and that he had to pay four hundred dollars to them in discharge of the vendor's lien or mortgage, in order to get a deed, then, if the lot comes to a sale, to that extent he should have priority over complainant in the proceeds. 7 Yer., 168. If, however, the improvements were made upon a part of the lot, the defendant, Allison, being the purchaser of the whole, the

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sum paid Deaderick and wife will be apportioned ratably, according to value, upon the different parts of the lot.

The decree of the Chancellor will be reversed, and the cause remanded to the Chancery Court at Knoxville, where an account will be taken upon the principles of this opinion, to ascertain the amount due complainant, and whether defendant, Allison, is entitled to priority to any, and what extent, in the proceeds of the sale of the lot or piece of ground upon which the improvements were made.

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WATERCOURSE. Nuisance. Mill-dam. Spring. Actual possession, by enclosure, not necessary to sustain suit for damages. For an injury, by overflow, to the spring and ford of another, it is not necessary, in order to a recovery by the plaintiff, to show a title to the land, or possession by *enclosure*. An actual possession by the plaintiff, for the ordinary purposes of use by his family and hands, is all that is necessary.

FROM MEIGS.

Under the instructions of GAUT, J., the jury returned a verdict for the defendant. The plaintiff appealed.

TREWHITT and GAUT, for the plaintiff.

J. B. COOKE, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is an action on the case brought by the plaintiff against the defendant, for an injury in overflowing his mill, spring,

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and ford, by means of a dam erected by the defendant, upon the same stream, below the plaintiff's land.

The proof left it in doubt whether the plaintiff's mill was, at all, affected by the back-water. The weight of the evidence is, that it was not. But the proof showed that the spring and ford were affected by it.

The Circuit Judge—among other things—in substance, charged the jury that the spring and ford were a part of the freehold; and for an injury to them, the plaintiff must show title to the land, or an actual possession by enclosure. This instruction, as applicable to the facts of this case, we think, is erroneous. Actual possession is all that is necessary for the purposes of this action; and it is not required that a title to the land should be exhibited. 1 Phillips' Ev., Cowen & Hill & Edwards' Notes, 646; *Large v. Dennis*, 5 Sneed, 595. It will, *prima facie*, be intended that the plaintiff has the requisite ownership. So thought the Circuit Judge. But in the absence of title, he was of opinion, that nothing short of an *enclosure* was evidence of an actual possession. It may be observed that in the proof of both the plaintiff and defendant, the mill, spring, and ford were spoken of as the plaintiff's; and his ownership of them seems to have been taken for granted; and if the defendant himself had not recognized the plaintiff's possession, those from whom he derived title had, by acts and declarations to that effect. The plaintiff, and those under whom he claimed had been in actual possession of the mill for more than twenty years, and had, if not for the same time, for a good portion of it, taken water from the spring, and used the ford in getting timber for the mill. He did not, to be sure, exhibit any paper title, defining his boundaries, earlier than the deed from Lucas to Elder, dated the 5th of March, 1849; and it did not appear that the land where the spring and ford were, had actually been granted; so that the presumption of a grant, or the statute of limitations did not attach to that part of the plaintiff's land. But it is difficult to perceive why the possession of the spring and ford by the plaintiff, for the ordinary purposes of use, by his

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family and hands at his mill, within the distance of a few yards, under his claim of ownership, was not as much an actual possession as if they had been enclosed. A spring, or ford, is often susceptible of no other possession than that of ordinary use and enjoyment. *Randolph v. Meeks*, Mar. & Yer., 58-60; 2 Meigs' Dig. 820.

But, aside from this view of the case, the deed from Lucas to Elder, and the other title papers read by the plaintiff, gave boundary to his land, and included the spring and ford; and the proof showed a claim of ownership on the part of the plaintiff, and those from whom he derived title, not only to the mill, but to the spring and ford, under these title papers, at least, from the 5th of March, 1849, to the present period; during all which time he, and they, were in actual possession of the mill, and use of the spring and ford in connexion therewith.

Though this, without more, did not serve to establish his title to the spring and ford, yet, we think it constituted evidence of an actual possession of both.

In *Pickens v. Delozier*, 2 Hum., 400, it was held that the possession of a part of a tract of land by A, who claims to the boundaries described in a written assurance, by virtue of which the same is held, is a possession to the extent of the boundaries therein described; and that such a possession would avoid a deed, made by one out of possession, under the champerty act—so far as it conflicted with the boundaries of the adverse deed.

We think it probable, from what we see of this record, that a new trial may avail the plaintiff nothing; but inasmuch as we cannot certainly know, from what now appears to us, that the merits of the case have been reached, we are constrained to reverse the judgment, and award a new trial.

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HANNAH NICELY, BY, &C. v. JOHN NICELY.

1. HUSBAND AND WIFE. *Divorce. Maintenance of wife and children. Chancery jurisdiction. Act of 1835, ch. 26, §§ 18 and 19. Code, §§ 2467, 2468.* By the act of 1835, ch. 26, §§ 18, 19, the substance of which is incorporated into the Code, §§ 2467, 2468, a married woman may exhibit a bill, in any Court having equity jurisdiction, against her husband, for cruel and inhuman treatment; or, such conduct on the part of the husband as may render it unsafe and improper for her to cohabit with him; or, such indignities offered to her person as renders her condition intolerable; or, that he has abandoned her; or turned her out of doors, and refuses or neglects to provide for her.
2. SAME. *Same. Same. Same.* Upon either of the foregoing causes being established, the jurisdiction is expressly given to the Court to decree a separation from bed and board forever thereafter, or for a limited time, as shall seem just and reasonable; or to make such other decree in the premises as the nature and circumstances of the case require.
3. SAME. *Same. Same.* The Court has power, whether it decrees a separation from bed and board or not, to make such order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, out of his property, as the nature of the case and circumstances of the parties render suitable and proper. The orders and decrees of the Court may be enforced by sequestering the rents and profits of the real estate of the husband, and his personal estate and choses in action.

FROM GRAINGER.

This cause was heard before Chancellor LUCKY, who dismissed the bill. The complainant appealed.

SHIELDS and TURLEY, for the complainant.

MAYNARD & WASHBURN, and COCKE, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

Hannah Nicely, by, &c. v. John Nicely.

In December, 1855, a bill was filed in the Chancery Court at Rutledge, on behalf of the complainant, Hannah Nicely, a married woman, by her next friend, Pleasant Starnes, against her husband, John Nicely, the defendant. The case made by the bill, and fully sustained by the proof, is substantially this: That several years after the marriage of complainant with defendant, and some two years before the filing of the bill, she became entirely *deranged*. That after her derangement, her husband confined her in an open out-house, some distance from his dwelling, with no one to watch over or take care of her; that she was almost denied food and raiment; deprived of fire in the cold of winter; destitute of every attention and comfort, and suffered to wallow in filth, until she became a living nuisance, revolting to look upon. And finally, her husband, before the filing of the bill, abandoned her altogether, removed his property, refused to support her, and declared his determination that she should not have any of his property. The prayer of the bill is, for the appointment of a guardian for the complainant, and a reasonable allowance for her maintenance, to be paid by the defendant. There is no prayer for a divorce or separation.

Upon the bill being filed, the Chancellor made an order appointing Starnes, the next friend, guardian, to take the custody and care of complainant until the further order of the Court; and, likewise, made an order on the defendant, to pay into the office a sum of money, for her support and maintenance, until otherwise ordered. Under this order, Starnes took care of complainant until her removal to the Lunatic Asylum, at Nashville, in October, 1856. The expenses of keeping complainant, and of conveying her to the Asylum, exceeded the amount received from the defendant; and a balance remains due to Starnes on account of advances made by him of his own money.

On final hearing, the Chancellor dismissed the bill, for want of jurisdiction, and rendered a decree against Starnes, the next friend, for all the costs of the cause. From this decree an appeal was prosecuted to this Court.

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The argument against the jurisdiction of a Court of Equity to decree the relief sought by the bill, is based upon the English authorities.

The doctrine held there, is, that the obligation of the husband to provide a suitable maintenance for his wife, is not a duty of which Courts of Equity will decree the specific performance, by requiring him to furnish a separate maintenance. That the remedy is in the Courts of Common Law, by action against the husband, in favor of any one who may, under such circumstances, have supplied the wife with necessaries suitable to her condition in life; that the jurisdiction of decreeing *alimony* belongs to the spiritual court, and can be properly exercised in that court as incidental to a decree of divorce only, and is not within the jurisdiction of a Court of Equity. Fonbl. Eq., 103-4, note *n*; 2 Story's Eq., sec. 1422, 5th Ed. Such seems to be the general doctrine of the English cases, though the cases upon this subject do not altogether agree. But in some of the American Courts, a more reasonable doctrine has prevailed; and the jurisdiction of a Court of Equity, in such cases, has been maintained upon general principles; and especially upon the ground of the utter inadequacy of the remedy at law. See 2 Story's Eq., sec. 1423 *a*; 4 Hen. & Munf., 507, and other American cases cited in Fonbl. Eq., 62, 63 and note; Ibid., 103, 104 and note.

If it were necessary, we should incline to follow the latter authorities, in the determination of this case. But it is not necessary to place the decision upon that ground, because, in this State, the jurisdiction is conferred upon Courts of Equity by express statute. By the act of 1835, ch. 26, secs. 18, 19, it is declared, in substance, that any married woman may exhibit a bill, in any Court having equity jurisdiction, against her husband, for "cruel and inhuman treatment of her by him; or such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him, and be under his dominion and control; or of such indignities offered to her person as to render her condition intolerable, and thereby forcing her to withdraw; or that he

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has abandoned her ; or turned her out of doors, and refuses or neglects to provide for her," &c. And upon either of the foregoing causes being established, the jurisdiction is expressly given to the Court "to decree a separation from bed and board forever thereafter, or for a limited time, as shall seem just and reasonable ; or to make such other decree in the premises, as the nature and circumstances of the case require:" and furthermore, it is expressly declared, that, "whether the Court shall decree a separation from bed and board, *or not*, to make such order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, out of his property, as the nature of the case and circumstances of the parties render suitable and proper, in the opinion of the Court." And the Court may enforce such orders and decrees by sequestering the rents and profits of the real estate of the husband, and his personal estate and choses in action.

Under this latter provision of section 19, the power of a Court of Equity to decree a suitable maintenance to the wife, in a case like the present, is not merely incidental to a decree of divorce or separation, but it is a distinct and independent power conferred upon the Court, and to be exercised, in proper cases, although no divorce or separation be decreed. And if, in a case where a decree of separation is sought, but fails, the Court may, nevertheless, proceed to decree a separate maintenance, or alimony, to the wife ; surely the same decree may be made, in a proper case, although no divorce or separation be asked for ; but simply alimony, or a separate maintenance. Upon this point there can be no doubt, on any fair construction of the statute. The same provisions are substantially incorporated into the Code, secs. 2467, 2468.

The present case is fully embraced, in our judgment, by the foregoing provisions of the statute, which seem to have been overlooked by his Honor, the Chancellor.

The jurisdiction of the Chancery Court was plenary to grant all the relief sought by the bill, under the foregoing act,

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taken in connexion with the act of 1851-2, ch. 163, which confers upon the Chancery Courts, concurrent jurisdiction with the County Courts, "over the persons and estates of idiots, lunatics, and other persons of unsound mind."

Decree reversed, and cause remanded.

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JOHN KINCAID v. JOHN MEADOWS *et al.*

1. **LAND LAW.** *Presumption. Possession. Partition. Grant. Deed.* A grant, deed, or partition of land will not be presumed from the mere assertion of ownership. In order to create such presumption, the claim of ownership must be accompanied with an exclusive, actual, adverse possession, for the length of time required by law to afford the presumption of a grant or title.
2. **SAME.** *Same. Same.* If a party, who claims to be the owner of a tract of land, conveys portions of the same, and the adverse possession of the parcels thus conveyed is held by his conveyees, such possession will not extend beyond the boundaries of the deeds; and will raise no presumption of title to that portion of the tract not embraced within the deeds.
3. **CHAMPERTY.** *Adverse possession. Title.* A sale by one out of possession, of land adversely held, is void, whether the vendor's title be valid or invalid; nor does it require any length of adverse possession to make a sale and conveyance of land so possessed by another champertous and void. The fact that it is adversely held is sufficient.
4. **SAME.** *Rents or profits for a year. Act of 1821. Question reserved.* What is the meaning of the words, "or taken the rents or profits for one whole year next before the sale," used in the act of 1821?
5. **PRACTICE.** *Witness intoxicated. When he may be introduced.* If a witness becomes intoxicated, and is not in a condition to be examined, the Court has the discretionary power to refuse to permit him to give evidence. But if the witness is in a condition to testify, before the cause is closed, the Court may permit him to be examined at any time during the progress of the trial, when he is shown to be in a condition to give evidence.

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6. **NEW TRIAL.** *Practice. Cumulative evidence.* If a witness is offered, and is not in a condition to give evidence, in consequence of intoxication, and is afterwards offered, it is not error, for which a new trial will be granted, to refuse to permit him to be examined, unless it is shown that he was so restored to his reason as to be capable of testifying; and if his evidence is cumulative.

FROM CAMPBELL.

Verdict and judgment for the defendants, before **TURLEY, J.** The plaintiff appealed.

NETHERLAND & HEISKELL, for the plaintiff.

BAXTER, HUMES, and TRIGG, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is an action of ejectment, in which the defendants had judgment in their favor, in the Circuit Court, and the plaintiff has appealed to this Court.

The correctness of this judgment is controverted upon the ground that the Circuit Judge erred in his instructions to the jury, and in the refusal to receive certain evidence offered by the plaintiff.

The plaintiff attempted to deraign title by reading the following papers: two grants from the State of North Carolina to Richard Henderson & Co., for 200,000 acres of land, in the year 1795—a deed of partition among the proprietors of these grants, dated the 8th of August, 1797—two deeds from Robert Burton to Sampson David, dated the 13th of December, 1815, one for 100 and the other for 200 acres—a deed for the same land from Isaac David, brother and heir of Sampson David, to Richard D. Wheeler, dated the 22d of September, 1828—a deed or deeds for the same land from Richard D. Wheeler to Jacob Sharp, dated the 24th of May, 1838—and a deed from said Sharp to the plaintiff for 1,000 acres of land

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—including the tracts of 100 and 200 acres aforesaid—dated the 11th of February, 1843. It is claimed that the 200 acres covered the land in dispute.

Robert Burton, from whom the plaintiff attempted to *de-
raign* title, was not one of the original grantees of the 200,000 acres, and no deed is shown from any one of them to him. He is embraced in the deed of partition, but the land in dispute is not within the boundary assigned to him. The land was laid off in lots, designated by letters upon the map and in the deed of partition, and the land in dispute—as well as the 100 and 200 acres aforesaid—lie within lot L, which contains several thousand acres of land, and the same was assigned to Walter Alvis in right of his wife; and there is no deed from either him or his wife to Burton—whose lands, if he were legally entitled to any share, were assigned to him in a different part of the grant. It appears, however, that Burton, as early as 1807, claimed to be the owner of lot L, and between that time and the year 1815, conveyed portions of it, in separate parcels, to different persons, who have never been disturbed in their purchases; that it was called and known as his land, without any adverse claim being set up by any one, until the year 1835, when Richardson and Smith made an entry within this lot and including the land in dispute.

It does not appear that either Burton, David, or Wheeler, ever had possession of any land within lot L.

The defendants read a grant from the State of Tennessee to Richardson and Smith, for 2,000 acres, dated the 11th of September, 1837—a deed from them to Solomon Jones for 162 acres, dated 24th September, 1840, and a deed from him to Martin Meadows, the ancestor of defendants, for the same land, dated the 1st of March, 1841. This grant and these deeds covered the land in dispute; and defendants or their ancestor, were in actual possession of it, in the fall of 1842, and have continued the possession ever since.

Upon these facts, the Circuit Judge did not err in instructing the jury, that a grant, or deed of conveyance, from Alvis and wife to Burton, could not be presumed. It is true that in

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the case to which we have been referred, of *Jackson v. Miller*, 6 Wend., 228, it was held that where a tract of land had been granted upwards of fifty years, and within twenty years after the grant, subdivisions of the tract were known by specific numbers, and a particular lot was called or known as the lot of one of the patentees, and there was no proof of a tenancy in common by the patentees for more than fifty years, it was held that a partition might be presumed, and that the lot in question had fallen to the patentee. Without undertaking to scrutinize this case, or to compare it with the many decided cases upon the same subject, it is enough to say, that the almost uniform course of decision, in England and America, is, that the mere assertion of ownership to land, unconnected with actual possession, can afford no presumption of title. In Tennessee, it has, so far as we are informed, been universally understood, that the claim of ownership must be accompanied with an exclusive actual adverse possession, for such length of time as to afford the presumption of a grant or title. Even if it had been proved that the several purchasers from Burton within lot L, and without the land in dispute, had held possession of their respective tracts from the date of their deeds, that could not aid the plaintiff, since such possession did not extend beyond the boundaries of the deeds, and could furnish no evidence of title in other portions of lot L, not embraced within said deeds. *Ross v. Cobb, et al.*, 9 Yer., 463, 470.

The Circuit Judge also instructed the jury that if the defendants were in the adverse possession of the land in dispute, at the time Sharp made his deed to the plaintiff, and Sharp was not in possession of any part, either by himself or tenant, then the deed would be void for champerty, unless he had been in the receipt of rents for one year preceding the time of sale; that the law required he should be in possession at the time of the sale, or should have received the rents for one whole year preceding it; otherwise, the fact of there being adverse possession at the time of the sale, would defeat the deed.

It is insisted on the part of the plaintiff that this charge is

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erroneous; but we are satisfied, as to him, it is not. The uniform construction of the act of 1821—which is, in most respects, a copy of the act of 32 H., 8, ch. 9—has been, that a sale by one out of possession, of land adversely held, is void. It is immaterial whether the vendor's title be valid or invalid. It becomes but a *pretended right*, within the statute, when he offers to make sale of it. It does not require *any* length of adverse possession, to make a sale and conveyance of land so possessed by another, champertous. The fact that it is adversely held is enough. Even in the case of a tenant, his possession becomes adverse to the landlord the moment his disclaimer is known to him; and though he is not permitted to deny his title, yet a sale by the landlord pending such adverse possession, the moment after it commenced, has been held champertous. *Bullard v. Copps*, 2 Hum., 409. And we apprehend that the fact that the vendor has taken the rents, either for less or more than a year next before the sale, if such a case can be supposed, where he is out of possession, and the land is adversely held, can make no difference. 2 Meigs' Dig., 843; *Whitaker v. Cone*, 2 Johnson's Cases, 58. The argument here is upon the words, "or taken the rents, or profits, for one whole year next before the sale," as used in the statute. It must be confessed it is difficult to understand what these words mean. In England they seem to have been applied to a tortious possession gotten wrongfully by a pretended title; and that although the true owner, if he regain possession, may sell immediately, yet that the wrongdoer, holding possession by a pretended title, must have been possessed, by himself or others, one whole year before he can sell, or contract to sell. 3 Thomas' Coke, pp. 582 to 585. And such seems to be Judge Catron's opinion in *Whiteside v. Martin*, 7 Yer., 397.

Thus, in 5 Comyn's Digest, Title Maintenance, (A 5,) 27, it is said: So, if a man who has a right, obtains possession wrongfully, he can sell within a year without danger, as, if a disseizor disseize the heir of the disseizor.

But without any conclusive determination of the meaning

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of the statute in this respect, it is enough that here the jury have found that the defendants were in the adverse possession of the land in dispute, at the time the plaintiff took his deed from Sharp, and that the latter was not, either by himself or tenant, in possession of any part of it. And so is the proof. This being so, the deed to the plaintiff is, as we have seen, champertous, and the Judge's charge, even if his vendor had title, *a fortiori*, if he had none, could have done him no hurt.

It is next insisted the Court erred in refusing to permit the witness, Usher, to be examined. The plaintiff chose to go to trial without the presence of this witness, relying upon his promise to attend; but he became intoxicated, and his attendance was only secured through an attachment; and when brought into Court, was unfit to testify because of his condition. And, again, during the argument, the Court directed him to be brought in to testify, but he was still intoxicated, and the Court refused to permit him to give evidence. This is not complained of, and could not be. 1 Greenl. Ev., sec. 365. But after the argument of the defendants' counsel was concluded, and before the concluding argument for the plaintiff commenced, the Court was again applied to, by the plaintiff's counsel, to be permitted to produce the witness in Court, *and if in a condition to be examined*, to examine him, with leave to defendants to rebut or comment on his testimony, which was refused by the Court—four hours having elapsed since he had been presented before.

This is assigned as error. In answer to this objection, it is sufficient to say that it does not appear when the witness was last offered to be examined, that he had been so restored to his reason, as to be capable of testifying; without which, as we apprehend, the Circuit Judge could not be put in error. And as to the application for a new trial, the evidence of this witness appears to be merely cumulative, and we are satisfied if it had been received, the result would have been the same. *McGavock v. Brown & Williams*, 4 Hum., 251, 253.

Affirm the judgment.

William T. Johnson v. Byerly & Owens.

WILLIAM T. JOHNSON v. BYERLY & OWENS.

ILLEGAL CONTRACT. Partnership. Implied promise. If one member of a firm receives stolen property, knowing it to have been stolen, and, in order to prevent a prosecution for the felony, pays the value of the stolen goods, out of the means of the firm, without the knowledge or consent of his co-partner, the innocent partner cannot maintain an action in the name of the firm, against the person receiving the money, to recover the same back. He is affected by the act of his co-plaintiff in the suit. Nor would the law imply a promise, under such circumstances, to refund the money.

FROM BLOUNT.

Verdict and judgment, under the charge of Judge BROWN, for the plaintiffs. The defendant appealed.

O. P. TEMPLE, for the plaintiff in error.

WALLACE and BAXTER, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

Byerly & Owens brought this suit against Johnson for \$250, illegally paid to him by Owens, out of the money of the firm. They recovered, and the case is brought up by Johnson upon supposed errors in the charge of the Court.

Johnson carried on a large tannery near the place of business of Byerly & Owens. A good deal of his leather was stolen, and he traced it to the store of defendants, where it seems it had been received by Owens, who conducted the business of the firm, from a slave, knowing that it was stolen. He charged Owens with the crime, and, perhaps, threatened him with a criminal prosecution. Owens admitted his guilt, and agreed to pay Johnson \$250, the supposed value of the leather,

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to keep the matter secret, and refrain from prosecuting him. It is not certain whether a note was first given, and then paid off, or the money was paid in the first instance, but that is not material. But that it has been paid and received, there is no dispute, and that it was the money of the firm, there can be but little doubt. When the facts came to the knowledge of Byerly, this action was instituted in the name of the firm, to recover back the money.

The law was charged in favor of the action, and there being no dispute about the facts, a judgment was recovered for the \$250. The Court was asked to charge, that if the facts were such as to repel Owens on account of the illegality of the transaction in compounding a felony, the joint action could not be maintained. But he refused, and held, that if Owens paid out the firm means, upon such illegal contract, without the knowledge, concurrence, or sanction of his partner, an action would lie in the name of the firm, to recover it back.

Of course, it is not controverted on any hand, that no suit would be entertained, of Owens or Johnson, upon any matter arising out of the transaction in any Court of Justice, because they were parties in the violation of law, by compounding a felony, and are equal in the guilt. This has been too often held by our own, and all other Courts, to be now open to controversy. But it is insisted, that the same rule does not exclude from the Courts the innocent partner, where the funds of the firm have been thus illegally abstracted by his co-partner; and that in such a case, the name of the guilty party may be united in the suit as a member of the firm.

In support of this charge, we have been referred to authorities, to show that any illegal use or misapplication of the means of a firm, or fraudulent use of its name and credit by one member, is not binding upon the others, and they may defend themselves against it, or assert their rights by joint action or defence. But all that is entirely foreign to the turning question in this case. The authorities make it very clear, that illegal or unauthorized contracts entered into in the name of the firm, by one of its members, cannot be enforced against

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it. No one would think of controverting that, but that is not the question now. It would be, if Johnson had sued upon the note that was said to have been given in the first instance, by Owens, for the money. In that case he would have been repelled, because of the taint upon the transaction; but that aside, he would have failed, because it was known by him to have been without the scope of the partnership business. But such is not this case. It is a suit by two partners to recover back money which one of them paid out of the firm money, upon an illegal contract to compound a felony, and defeat public justice. The contract was executed. The question is, not whether Owens had authority to make this use of the firm means, or whether his partner is bound by it, for upon that, there could be no doubt; but having so used the money, can it be regained by suit. It would not be contended for a moment, that Owens could maintain this suit, if there were no partnership. No Court would entertain a suit in favor of one whose hands were so stained. He has not only admitted his guilt of a felony, in receiving stolen goods, but has added the offence of compounding the felony. In such cases, the Courts of Justice will not contaminate themselves by entertaining a suit in behalf of either party, but leave them in the condition they have placed themselves, giving to the defendant that advantage which the principle of non-intervention secures to him. Not because *his* case is the better one, for they are equal in the violation of the law and public policy; but because he has the advantage of position, merely. But it is contended that Byerly is innocent, and that as the funds in which he was interested have been illegally paid into the hands of Johnson, by his guilty partner, that he has a right to sue, and use the name of the firm, as he cannot sue for partnership funds in any other way. Such was the opinion of the Circuit Judge. We cannot concur in it. The plaintiffs must succeed, or fail, together. Byerly must take the consequences of his corrupt association. If one plaintiff must be repelled, the other must go with him; they cannot be separated. His partner is accountable to him for a misapplication

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of the firm means, but not the recipient of them, at the hands of a Court, under such circumstances. This result is the less to be regretted in this case, because, there is reason to believe that the leather, for which the money was paid out of the firm, went into the business, though without the knowledge, perhaps, of Byerly. To that, however, we give no consequence, but simply put the case upon the ground, that if one partner, who is united in a suit as plaintiff, must be repelled on the ground stated, so must the other, though he be innocent of actual participation in the crime. We have been referred to no authorities on the precise point, by either side, but such we understand to be the principle which must govern the case.

It might be added, that upon another ground the plaintiffs must fail. The implied promise to repay the money, upon which the suit is based, has nothing to support it but the unlawful agreement and transaction in which it was received and paid, and, therefore, cannot be the subject of a suit. *Bates v. Watson*, 1 Sneed, 380.

The judgment will be reversed, and a new trial granted.

F. B. GWINTHER v. GEORGE F. GERDING.

1. **PARTIES.** *At law the suit must be in the name of the person who has the legal interest.* In the legal forum, whether the contract be express or implied; or whether it be by parol, or under seal, or of record, suit must be brought in the name of the person in whom the legal interest is vested, notwithstanding, by the terms of the contract, the beneficial interest may be vested in another person.
2. **SALE OF REAL ESTATE.** *Contract. Fraud. Election. Case. Deed.* In the absence of all fraud, the rule of law is, that the entire agreement of the parties is presumed to have been incorporated in the deed, or written contract; and if the purchaser has failed to provide

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for his own security, by appropriate covenants, he is remediless. *Fraud* constitutes an exception to this rule. It vitiates the contract; and the injured party may elect to treat the deed, or contract, as a nullity, and resort to an action on the *case* for the *deceit*.

3. **SAME. Same. Same.** The rule is the same, whether the contract is executed, or executory; or whether the *deceit* is in relation to a thing included in the deed, or something extrinsic; or whether the subject is real or personal property. Hence, an action on the *case* will lie, for a fraudulent representation, as to the *title*, in the sale of land.
4. **SAME. Same. Same. Case. Damages.** An action on the *case* is of an equitable nature, in which all the circumstances of the case may be looked to by the jury, in estimating the damages.*

FROM MORGAN.

There was a demurrer to the declaration, which was sustained, GARDENHIRE, J., presiding. The plaintiff appealed.

HUMES, MYNOTT, and SCOTT, for the plaintiff.

MAYNARD & WASHBURN, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action on the case for deceit in the sale of land. There was a demurrer to the declaration, which was sustained, and the suit dismissed.

The declaration alleges, in substance, that, for the consideration therein averred, the defendant undertook and agreed with the plaintiff, that he, the defendant, would transfer and convey all his right, title, and interest in and to a certain tract of land, situate in Morgan county, to one Edward Gaetz.

The *gravamen* of the action is the false and fraudulent representation of the defendant, that he had a good and inde-

* As to the measure of damages, in a case of fraud in the sale of and, see the case of *Key et al. v. Key et al.*, reported in this volume.

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feasible title to said land, and that it was free from any incumbrance; by means whereof the plaintiff was induced to enter into the agreement for the purchase thereof; whereas, in truth, the defendant did not have a good title to said land, nor was the same free from incumbrance, &c., whereby the plaintiff sustained damage, &c.

The allegations being admitted by the demurrer, the question is, can the action be maintained?

If the action be sustainable upon the facts as alleged, there can be no doubt that it was properly brought in the name of the plaintiff, in whom the legal interest is vested, notwithstanding the beneficial interest was vested in another person, by the terms of the contract. This technical rule is of universal application in the legal forum, whether the contract be express or implied, or whether it be by parol, or under seal, or of record. 1 Chitty on Pl., 3, 4.

The main question is one in respect to which there is some confusion and contrariety in the cases to which we have been referred.

It is assumed, for the defendant, that where a contract for the sale of land has been completed by the execution and delivery of a deed of conveyance to the vendee, an action for deceit, in the contract of sale, on the ground of a false and fraudulent representation of *title to the land*, will not lie. It is said, that after the contract has been executed, all that may have passed between the parties, in the course of the negotiation, must be regarded as merged in the deed; and that in case of failure, or want of title, the only remedy of the vendee, in a Court of Law, is upon the covenants in his deed; and that if he has neglected to protect himself by proper covenants, he is without remedy at law.

There are cases which seem rather to favor this view. See 5 Wend., 30; Cro. James, 196; 2 Ld. Raymond, 1119.

It seems to be conceded, that where the fraudulent representation is not in relation to the simple fact of *title*, but to some incidental or collateral matter, as the rents or profits derived from the land, appurtenances to it, incumbrances upon

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it, the location, or quality, &c., the action for deceit may be sustained. This is certainly a very refined distinction.

It is true, that none of the cases to which we have been referred in support of the action, presents the isolated question of a false representation as to *title*; but the principle upon which the decisions are based, it seems to us, applies as well to a deceit in respect to title, as to things collateral or appurtenant to the land. The principle is, that fraud or deceit, accompanied with damage, constitutes a good cause of action. This principle is of universal application, and its soundness is not questioned by any respectable authority. Since the case of *Pasley v. Freeman*, 3 Term. Rep., 56, the application of this principle to cases of false representations, relating to the sale of *personal* property, has been considered as a settled question; and it would certainly be difficult to assign any sensible reason why its application should not be the same in cases of deceit in the sale of real property. We take it that no just distinction can be founded upon the mere difference of the subject-matter of the representation.

Nor can it be important, as respects the just application of this doctrine, whether the false representation relates to a thing falling within the scope, intention, and operation of the deed, or to something extrinsic of it. The gist of the action is the intentional fraud. If a representation be made materially affecting the subject-matter of the sale, which, at the time, is known to be false in fact, it is no answer to the fraud to say, that the injured party may have redress in another form, upon the covenants in his deed. Parties frequently have a choice of remedies at law. And as we are treating of the legal remedy alone, we, of course, say nothing in respect to the remedy of the party, in a case like the present, in equity.

It is certainly true, that, in the absence of all fraud, the rule at law is, that the entire agreement of the parties is presumed to have been incorporated in the deed or written contract; and that if the purchaser has failed to provide for his own security by appropriate covenants, he is remediless. But

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to this rule, according to all the authorities, *fraud* constitutes an exception. The fraud vitiates the contract, and the injured party may elect to treat the deed or contract as a nullity, and resort to an action on the case for the deceit.

In this view, it cannot be at all important whether the contract was executed or executory; or whether the deceit was in relation to a thing included in the deed, or something extrinsic; or whether the subject was *real* or personal property.

In support of these general views, we refer to *Monell v. Colden*, 13 Johns. Rep., 396; *Culver v. Avery*, 7 Wend. Rep., 380; 1 Comstock's Rep., 305, and cases cited.

The principle under discussion is one of much practical importance in respect to sales of land, as well where the contract has been executed as where it remains executory. Where a deed has been accepted, without covenants for the protection of the purchaser, it is the only remedy at law. And even where the deed contains a covenant of warranty, it affords, in most cases, but a remote and inadequate remedy. So, too, in executory contracts, an action on the case for deceit, which is of an equitable nature, and in which all the circumstances of the case may be looked to by the jury, in estimating the damages, will be found, in many cases, to be a more ample and appropriate remedy.

We are of opinion, therefore, that the demurrer was improperly sustained, and the judgment will be reversed. The plaintiff will be at liberty to amend the declaration by stating the cause of action with more precision and certainty.

Elisha Clark v. John Cantwell *et al.*

ELISHA CLARK v. JOHN CANTWELL *et al.*

1. TRUST AND TRUSTEE. *Implied trust. Land. Redemption. Widow.* If the land of an intestate is sold, and his widow redeems it within two years, with her own money, a trust will be implied in favor of the heirs; and, upon refunding the redemption money, or their just proportion of it, they would become entitled to the estate in *fee*, subject to the widow's right of dower.
2. SAME. *Same. Same. Same. Lien. Husband and wife.* The widow would have a lien on the land redeemed, for the re-imbursement of the redemption money; and, on failure of the heirs to pay, she may subject their interest in the land to its satisfaction. This being so, upon the subsequent marriage of the widow, the lien would inure to the husband, as a chose in action of the wife; and, *a fortiori*, would the lien so inure in case the payment of the redemption money should fall upon the husband, after the marriage.
3. SAME. *Same. When the land is redeemed after the two years.* Where the redemption is effected by the widow, by the voluntary agreement of the parties in interest, after the expiration of the time limited by the statute—but with the intention that the effect should be the same as if the redemption had been regularly made in proper time—the rights of the respective parties would be the same, as if the redemption had been made within the two years.
4. SAME. *Same. Same. Extent of the lien.* The extent of the lien in such case, would be for the redemption money and incidental charges. The redemption would be regarded, in law, as a *purchase* for the exclusive benefit of the widow and heirs; and the land would not be subject, in their hands, to the pre-existing debts of the estate of the intestate.
5. SAME. *Same. Same. Same. Advances made to the heirs.* As the creditors of the intestate could not, *directly*, subject the land to the payment of their debts, the widow, or her second husband, could not, as against the heirs, *indirectly*, charge it, by reason of having paid the debts of the estate; nor can advances in money, voluntarily made by the widow or by her said husband, to the heirs, create a lien upon the land.
6. SAME. *Same. Same. Same. Creditor. Attachment.* Such advances would constitute a mere personal liability on the part of the heirs; and the widow, or husband, as a creditor, would be entitled to satisfaction out of the fund arising from the sale of said land, if sold by the heirs, in the hands of the purchaser, and attached by him or her.

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7. **SAME.** *If land is purchased, and not redeemed by the widow. Descent.* If the land of the intestate had been sold, and the purchaser had acquired a good and indefeasible title—the time allowed by the statute to redeem having expired—and the widow purchases the land unconditionally, she acquires an estate in *fee simple*; and no implied trust is raised in favor of the heirs. In such case, the land is absolutely hers, and, at her death, descends to her heirs at law.

FROM CLAIBORNE.

A final decree was pronounced by LUCKY, Chancellor, in favor of the complainant, for \$1,000, and the same declared to be a *lien* on the land. The administrator of Cantwell appealed.

W. M. COCKE, and EVANS & THOMAS, for the complainant.

HEISKELL, and MAYNARD & WASHBURN, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

Daniel Jones died intestate in Claiborne county, in June, 1845, leaving a widow and three infant children surviving him. Administration on his estate—which consisted of only a small amount of personalty—was granted to Joseph H. Davis.

Some years before his death, the intestate owned a tract of land in Claiborne county, which he conveyed by deed of trust to secure certain debts due from him to Jacob Shultz and William Houston, severally. Said debts not being paid at the time stipulated in the deed of trust, the land was sold by the trustee, and was purchased by the creditors, Shultz and Houston. The time for redemption expired, and the title became absolute in the purchasers, sometime before the death of said Daniel Jones.

After the death of said Jones, Shultz and Houston consented that, if the widow would pay to them the amount of their respective debts, with the interest which had accrued thereon,

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they would convey to her said tract of land. And the land being of double the value of the amount of said debts, the widow undertook to do so. The two debts together amounted to about the sum of \$550. In order to raise the purchase money, the widow made a note for \$500, which was indorsed by some of her friends, and was discounted in bank. The proceeds of said note were paid to Shultz and Houston, who, thereupon, made a conveyance for said tract of land to the widow, in absolute fee simple.

Shortly after this transaction, the widow intermarried with the complainant, Clark, who entered into possession of said land, and occupied the same until some time after the death of his wife, which happened in 1852—having retained the possession for a period of some six or seven years.

After the death of Mrs. Clark (formerly the widow of said Daniel Jones,) her three sons, the issue of the marriage with said Jones, claimed said tract of land as having descended to them as heirs of their mother; and, on arriving at age, sold and conveyed the same to defendant, Cantwell.

Complainant alleges, and there is proof tending to show, that, after his marriage with the widow, he paid the amount of the debt due to the bank, which had been created by her in the purchase of said land, out of his own means. It also appears, that an arrangement was made between the complainant and Davis, the administrator, by which the latter surrendered to complainant the assets of the estate, on his agreeing to assume the payment of the debts of the estate; and under this agreement, the complainant alleges that he paid out, perhaps, upwards of \$200 more than the amount of the assets received from the administrator. The complainant further alleges, that he made advances to, and paid debts, from time to time, for each of the three children of his wife by her former husband, amounting in all to a considerable sum.

The bill assumes, that the complainant has a valid *lien* on said tract of land, to reimburse him the five hundred dollars paid to the bank; also, the two hundred dollars paid by him in discharge of debts due from the estate of Jones, beyond

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the assets received from the administrator; and likewise the several sums paid to and for the children of his wife. And this relief is claimed, as well against the children and heirs of the wife, as against Cantwell, the purchaser from them, on the ground that he purchased with full knowledge of the facts, which is shown to be true.

This claim to relief is based upon the hypothesis, that the transaction between the widow and Shultz and Houston, in relation to the land, was not a *purchase* by her for *her own benefit*; but that, both in intention and legal effect, it was simply a *redemption* of the land, by the consent of the purchasers, after the expiration of the period for redemption. And that the purpose of all the parties was, to restore the title to the estate of Daniel Jones, and to place the land in the same condition as if it had been redeemed by said Jones in his lifetime, not only as regarded the rights of the widow and heirs at law of the intestate, Jones, but also as regarded the rights of the creditors of his estate.

There is a labored effort in the amended bill, and in the evidence, to give the case this complexion, though in the original bill the contrary was alleged; it is there distinctly stated to have been a *purchase* by the widow, and, impliedly, for her own benefit.

If the case, as presented in the amended bill, were made out, there can be little doubt that the complainant would be entitled to relief, at least to the extent of the money advanced by the widow to Shultz and Houston.

Suppose the widow to have redeemed the land, with her own money, *within* the time limited by the statute for redemption, what would have been the legal consequences? Unquestionably, a trust would have been implied in favor of the heirs; and upon refunding the redemption money, or their just proportion of it, they would have become entitled to the estate in fee, subject to the dower interest of the widow. In what proportions the widow and heirs should contribute, in such a case, is a question not presented in this record. In the case just supposed, there can be no doubt that the widow would have

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had a *lien* on the entire tract of land for reimbursement of the redemption money; and, on failure of the heirs to pay, she might have subjected their interest in the land to its satisfaction. This being so, upon the subsequent marriage of the widow, the lien would inure to the husband, as a chose in action of the wife; and, *a fortiori*, would the lien so inure, in case the payment of the redemption money had fallen upon the husband, after the marriage.

If the foregoing position be correct, it would seem to follow, that, where the redemption was effected by the widow—by the voluntary agreement of the parties in interest—after the expiration of the time limited by the statute, but with the intention that the effect should be the same as if the redemption had been regularly made in proper time, the rights of the respective parties would be the same as in the preceding case.

But, the extent of the lien, in such case, would be for the redemption money and incidental charges. The redemption of the land, under such circumstances, would be regarded, in law, as a *purchase* for the exclusive benefit of the widow and heirs; and it would not be subject, in their hands, to the pre-existing debts of the estate of the deceased husband and father. And if the creditors of the decedent could not directly subject it, it is clear that the widow, or her after husband, could not—as against the heirs—indirectly charge it, by reason of having paid debts of the estate; such payments were voluntary, and at the peril of the person making them; and the heirs cannot be held liable therefor in any manner. And it is equally clear, that advances in money, voluntarily made by the widow or by her subsequent husband, to the heirs, cannot create a *lien* upon the land: such advances constitute a mere personal liability.

But the complainant has failed to establish the facts stated in the amended bill; the weight of the proof, and the presumption of law, are against the assumptions of the bill.

The title to the land, as before stated, had become absolute in Shultz and Houston, in the lifetime of Daniel Jones, by his failure to redeem. Shultz proves, that on the application of

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Mrs. Jones, after the death of her husband, he and Houston agreed to let her have the land, provided she would pay the amount of their claims, and the costs incident to the execution of the trust. And, accordingly, the land was conveyed to her unconditionally, in fee simple.

It is true, that Davis, the administrator of Jones' estate, proves that he suggested to the widow the arrangement of getting the purchasers of the land "to convey it back to her, by paying their claims," * * * "and by so doing, make the estate in a condition not to report it insolvent;" and he further states, that "when the land was conveyed to Mrs. Jones, she agreed, verbally, that it should stand good for the bank debt, and the other liabilities of the estate."

It is very clear, that, if parol evidence of this agreement were admissible, the agreement itself—so far, at least, as respects "the other liabilities of the estate,"—was simply a *nudum pactum*.

The legal effect of the transaction, in view of all the facts, was to invest Mrs. Jones with the legal title, as owner in fee of the land. The parol evidence relied on, if admissible, is insufficient to give the case a different complexion. If it were to be conceded that a trust existed, or rather would have existed in favor of the heirs, upon their contributing towards the redemption money, it is sufficient to say, that they did not contribute, or offer to do so, in the lifetime of their mother; and, consequently, she died the absolute owner of said land; and having died intestate, it of course descended to her heirs at law—the three children of her former marriage with Daniel Jones; there being no issue of the subsequent marriage with the complainant.

From this view of the case, it follows, that the complainant is entitled to no relief, as respects his payment of the bank debt, with which money the land was purchased. This was the debt of his wife, existing at the time of the marriage, and in discharging it, he merely acquitted himself of a legal obligation resulting from the marriage relation.

As respects the debts of the estate of the former husband,

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paid by complainant, the payment was voluntary and officious, on his part, and he is without remedy.

As respects the payments or advances made by the complainant, for the defendants, (the children of Daniel Jones,) which constitute a personal demand against each of said defendants, in favor of complainant; he, as a creditor, is entitled to satisfaction of said demands out of the fund arising from the sale of said land, in the hands of the personal representative of Cantwell, the purchaser; which fund was attached in this suit—the defendants, the Joneses, to whom said fund belongs, being non-residents.

Decree reversed.

ELDRIDGE HORD v. THE ROGERSVILLE AND JEFFERSON
RAILROAD COMPANY *et al.*

1. RAILROAD COMPANY. *Election. Notice of. Acts of 1852 and 1854.* By the second section of the act of 1852, before the County Courts are permitted to take stock in any railroad company, the question of subscription shall be submitted to the qualified voters of the county, and receive a majority of the votes cast, in the affirmative. The act of 1852 is so amended by the act of 1854, as to require a majority of the qualified voters of the county, taking the preceding Governor's election as the basis. This being so, the failure to give the notice of the election required by this act, will not operate to the prejudice, but in favor of the negative voters; and they cannot be heard to complain thereof. Said provision, also, is directory; and a failure to give the notice required by the act will not vitiate the election and the subscription of stock in pursuance thereof.
2. SAME. *Same. Same. Means used to carry the election.* If, pending such election, prominent citizens of the county enter into an agreement with the citizens of a civil district to subscribe an amount equal to the tax of that district, to improve the public road leading from that district to the terminus of the railroad, upon condition that the proposition to take stock receives a majority of the votes of such district,

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such agreement is not in the nature of a bribe, does not contravene public policy, and will not vitiate the election and the subscription of stock in pursuance of the vote.

FROM HAWKINS.

The bill was dismissed, LUCKY, Chancellor, presiding. The complainant appealed.

LYON and ARNOLD, for the complainant.

NELSON, HAYNES, and HEISKELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill is filed by Hord, as a citizen and tax-payer of Hawkins, to be relieved from the railroad tax, upon the ground that the subscription for the stock by the Court was void, on account of the invalidity of what is called the election before the people.

He makes two objections in his bill to the proceedings:

1. "That no written notice of the said election was ever posted or set up in several of the election districts or precincts; that in his civil district the notice was posted on eleven days before the election, and in another five days."

By the second section of the act of 1852, before the County Courts are permitted to subscribe stock in any railroad, the question of subscription shall be submitted to the qualified voters, and obtain a majority in the affirmative. This, by the act of 1854, must be equal to a majority of all the votes given for Governor at the next preceding election. That is, without regard to the negative votes, the affirmative must exceed one-half of the entire gubernatorial vote at the last general election. Upon this point there is no question, as the affirmative prevailed by fourteen votes. But the act provides, "that notice of the said election, and the amount of stock to be sub-

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scribed, must be posted at each election precinct in the county, at least thirty days preceding the said election." By the act of 1852, it was only required that a majority of the votes given on the question submitted, should be for the subscription. So we held in the case of the *Louisville and Nashville Railroad v. Davidson County*, 1 Sneed, 637. It was then very important that all the voters be at the polls, as well those against, as those for the subscription. But it is not so since the act of 1854. It is now to the interest of the negative, that by want of notice and all other causes, the people should not attend the polls, and that no election should be held at any precinct. A negative vote avails no more against the tax than a failure to vote. The affirmative must get a majority of all the votes polled in the preceding election for Governor, without any regard to the negative votes. The interest in the general notice to all the people, and bringing out a full vote, is entirely on the affirmative side of the question. Therefore it does not lie in the mouth of the complainant, and others concurring with him in opposition to the subscription, to complain of the want of notice, or a failure to open the polls at certain precincts. So far as they are concerned, the failure inured to their advantage, and for that reason, they have no just ground of complaint. It would seem, then, to be absurd, to hold the action of the people void for want of this statutory requirement.

But, independent of this view, we would not hold that the failure on the part of the officers to comply strictly with that direction of the act of 1852, in regard to the notice, would invalidate the election, or be regarded as a condition precedent, as is contended, to the binding effect of the decision of the people. Its whole object is to give information to the voters and tax-payers, and excite their consideration of the proposition submitted, and bring them to the polls. Where it clearly appears, as in this case, that much excitement prevailed, full discussion was had, and a deep and pervading interest in the question existed in every district of the county, the whole object of the written notice was answered. It would savor too much of technical precision, and an adherence

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to the letter, without regard to the spirit and reason of the statute. This, as well as all the other requirements of the statute, ought to be observed in this important proceeding, by which a heavy tax is saddled upon the people] But, on the other hand, the same people have a deep, general interest, in the great object to be promoted by the burthen to be imposed, and the expressed will of the majority ought not to be defeated by unsubstantial objections on the part of the minority. It has been invariably held, upon analagous questions, that where it appears that no injury has resulted from a failure to observe these requirements of the law as to notice, and the object of the notice is otherwise accomplished, that the law shall only be regarded as directory. Our books are full of these cases, and they need not be cited. In the case in hand, the canvass was very thorough and exciting, and the whole community enlisted in the animated contest. The people were aroused, and there was no want of ample notice of the election.

2. It is next charged "that appliances were used to influence the result of this election, wholly indefensible, and if not amounting to direct bribery, were altogether inconsistent with the freedom of the ballot and the purity of the elective franchise, and, in fact, a fraud upon the electors who felt it to be their duty and interest to oppose the subscription."

The specification under this charge will be found in the following bond, drawn up and signed on the 3d of August, 1857, just three days before the election :

"Provided the tax for the Rogersville and Jefferson Railroad shall receive a majority of the votes in Hawkins county, we, the undersigned, bind ourselves, that if the second civil district, in the county of Hawkins, Tenn., give a majority of the votes of said civil district in favor of the railroad tax, in the election which is to take place on the 6th day of August, 1857, that we will pay an amount equal to the amount of said railroad tax of the said civil district, to whatever person or persons may be appointed to receive it, for the purpose of im-

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proving or making a good road across Clinch mountain to Rogersville, at any point that a majority of the voters of said district may choose; and for the faithful performance of our said agreement, we bind ourselves in the sum of \$5000."

This is signed by twenty citizens of the county, under their hands and seals. Most of the directors and the president of the road are of the number, but not officially, and the corporation is in no way implicated as such. They are all prominent and influential men. It is strenuously insisted that, although it was not so regarded by the respectable citizens who entered into the obligation and made the proposition, yet it was in the nature of a bribe, and of such illegal and immoral tendency as to entirely vitiate the election, and authorize a Court of Chancery to declare it null and void. We do not so regard it. The case does not make it necessary to consider what would be the effect of an offer and acceptance of a bribe or private reward for votes. That is not this case. It was a proposition by one portion of the citizens of the county to another, that if the latter would co-operate with them in taking a joint burthen upon themselves to promote one public improvement, they would assist them in another, in which the persons addressed felt a more immediate local interest. That is, if the citizens of the second civil district of the county would concur with them in voting in favor of a subscription, by the county, of \$50,000 of stock in the Rogersville and Jefferson Railroad Company, they would subscribe an amount equal to the tax that might thereby fall upon the citizens of that district, in consequence of said subscription, to make a good road from that district, across Clinch mountain to Rogersville, to facilitate their access to the terminus of said railroad. This was nothing more than an appeal to the public spirit of one portion of the people by another, and to stimulate them by the offer of reciprocal benefits, in the general improvement of the county, for the interest of all. We can see nothing in it against public policy or good morals. It cannot be assimilated to elections for political or other offices,

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and, therefore, we need not consider what the effect of such a thing would be in those cases. The doctrines in relation to the elective franchise, and the vigilance with which the purity of the ballot-box should be guarded, have no direct application to cases of this description. This is not properly an election, but a decision of the people in reference to a matter of pecuniary, private, and public interest. The county, as a political corporation, are called upon to determine whether it will take stock in a private corporation, organized to advance both their individual and common welfare. This question, it is provided by the law, shall be referred to the voting citizens of the county, before the subscription shall be made by the county authorities. In deciding this question, the citizens may operate upon each other by all the arts of persuasion and influence, debate and eloquence, they see proper to adopt, so far as the binding force of their decision is concerned. Their false representations, fallacious arguments, and improper influences, are questions of morality, affecting the personal character of the actors, but cannot invalidate the result. If the rigid rules contended for in argument were to be adopted, perhaps few elections would stand, and the government could not go forward; nor many of these grand improvements, requiring the united means and co-operation, both voluntary and coercive, of the whole community, be accomplished.

The subscribers to this instrument, feeling the deep importance of the great work in question to the common prosperity, were willing not only to take upon themselves the burthen of the taxation that would result, but also to aid the people of that particular section of the county in a public work they had at heart upon the prescribed conditions. What harm was there in it? what mischief could it do? Two great public objects were to be promoted by it. It was an address to their judgment, through their common interests. There was nothing sinister or mercenary in it. It was tainted with none of the ingredients of a bribe. The motive was high and elevated, and in no way censurable.

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But if it were morally wrong, and against public policy, we are unable to see how it could be made to have the effect of vitiating, the so-called, election. It might in that case, perhaps, be made available in a contest before the County Court on the return of the votes. The question is a very different one when the proceeding is attempted to be impeached in a Court of Equity.

We have preferred to examine this case upon its merits, without reference to the various objections taken to the jurisdiction of the Court, on account of the finality of the action of the County Court, as well as other points made in the answer and arguments for the defence. We do not in any way pass upon them, as we think the case clear upon its merits.

The conclusion is, that the decree of the Chancellor is affirmed, and the bill dismissed with costs.

ISAAC, (A MAN OF COLOR,) BY HIS NEXT FRIEND v. WILLIAM
SLIGER *et al.*

1. **FREEDOM.** *Contract of. Master and slave.* A contract entered into, directly, between the master and slave, for the freedom of the latter, upon a consideration moving from the slave, or from a stranger on behalf of the slave, is valid and obligatory. But an agreement without any consideration, imposes no obligations upon the master; nor confers any rights upon the slave. Whatever may be the obligations of such an agreement, in *foro conscientie*, it is, in contemplation of law, a *nudum pactum*, and cannot be enforced.
2. **SAME.** *Same. Trust. Will. Revocation.* After the execution of his will, the testator can dispose of a slave therein bequeathed, by sale, or otherwise. So, he can confer by parol declaration, a present right of freedom upon the slave; or stipulate with his wife that the slave should be free at her death; or she should set him free, and in

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this way create a parol trust in favor of the slave. In either case, there would be a revocation of the will, *pro tanto*, and the contract for freedom would be enforced.

FROM WASHINGTON.

A decree was pronounced by LUCKY, Chancellor, in favor of the complainant. The defendants appealed.

NELSON and DEADRICK, for the complainant.

MAXWELL & MILLIGAN, and ARNOLD, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant seeks by this bill to be emancipated, by a decree of the Court of Chancery.

The right of freedom is based upon a supposed agreement alleged to have been made with him by Henry Sliger—his former owner. The allegation of the bill is, "that the said Henry, previous to his death, agreed with the said Isaac, that he should be free at the death of Elizabeth, (wife of said Henry,) in the event that he conducted himself properly up to the happening of that event."

It appears that said Henry Sliger died in Washington county, in this State, in 1834. Immediately preceding his death, he duly made and published his last will and testament, whereby he devised and bequeathed all his property, both real and personal, to his widow during her life or widowhood, with remainder to his seven children. The widow died in 1855, upwards of twenty years after the death of her husband, without having made any provision for complainant's emancipation; and an attempt being made, soon after her death, by some of the children of testator, to sell complainant, this bill was filed.

It appears that complainant lived with, and served his mistress, up to the time of her death. And although his treat-

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ment of her, and his general good conduct, are complained of by the defendants in their answers, we think that, other difficulties out of the way, the relief sought by complainant could not be successfully resisted on this ground.

The main question is, has the complainant established a legal right to freedom?

The proof upon this point rests in the parol declarations of the testator. One witness proves that he heard the testator say, not long before his death, ("when his will was read over, and witness asked him if he had set his negro, Isaac, free, as he, Isaac, was not mentioned in the will,") "that he had left all to Betsy (his wife) during her life; and that Isaac was to serve her during her life, and at her death, she was to set him free, if he done well." This witness had had frequent conversations with testator on this subject, on former occasions; and had heard him say, (in the presence of Isaac,) "that he intended to set him free at his death"—"if Isaac would be as good as he had been." Another witness heard the testator say, the evening he died, "that he wanted his black boy, Isaac, set free, at the death of his wife, if he was a good boy to her." This was said to a neighbor who was present, in a conversation between the testator and him, and in the expectation of approaching dissolution. A third witness heard the testator say, "that if Isaac was a good boy, he would free him." This was, perhaps, some time before his death.

The foregoing is the substance of the evidence; and this, it is assumed for the complainant, furnishes sufficient evidence of a valid *contract* between Sliger and complainant, entitling the latter to freedom. This is a mistaken assumption. The proof establishes no contract. We need not stop to discuss the validity of a contract entered into directly between master and slave, for the freedom of the latter. It is settled by our Courts, that such a contract—upon a consideration moving either from the slave, or from a stranger on behalf of the slave—is valid and obligatory. 8 Hum., 185. The proof shows, that the master entertained different purposes and intentions in regard to the emancipation of complainant, at different

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times. His first intention was, to free him at his own death, if he continued to be a dutiful servant. But nothing was done in execution of this purpose; and it was afterwards abandoned. It was at most a mere voluntary declaration or promise, which imposed no obligation on the master, nor did it confer any right on the slave. And had it even assumed the form of an agreement between the master and slave, whatever might have been its obligation *in foro conscientiæ*, in contemplation of law, it must be regarded a *nudum pactum*.

The will, which was made, perhaps, on the day preceding the death of testator, demonstrates that his intention then was, that the complainant should remain in the condition of slavery. And this leads us to consider the force and effect to be given to the parol declaration made *after* the execution of the will—"that Isaac was to serve her (the widow) during her life, and at her death, *she* was to set him free, if he done well." Did this declaration create a trust in favor of the slave?

It is unquestionably true, that as the will was inoperative until after the testator's death, and the title to the slave still in him, he might, after the execution of the will, have sold or disposed of the slave in any manner authorized by law; and this would have been a revocation of the will *pro tanto*. He might, after the will, have conferred on the slave, by parol declaration, a present right of freedom; and this would likewise have been, to that extent, a revocation of the will. So, he might, subsequent to the making of the will, have stipulated with his wife that she should emancipate the slave, or that he should be free at her death, and in this mode have created a valid parol trust in favor of the slave, which would likewise have been a partial revocation of the will. See Hill on Trustees, (2 Am. Ed.,) 69, et. seq. But none of these things were done. It does not appear that, after the execution of the will, the testator communicated to his wife, directly or indirectly, any wish or intention that the slave, Isaac, should be emancipated at any time, or that he enjoined any duty upon her, touching the emancipation of said slave, nor does it ap-

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pear that she had any knowledge that such parol declarations had been made by the testator.

It is clear, therefore, that these declarations do not affect the conscience of the legatee, nor do they create a trust in favor of the slave.

The widow, if so disposed, could not, as against the owners of the remainder interest, have emancipated the complainant. And it is equally clear, that these declarations, after the will, so far from being evidence of any intention on the part of the master, by his own act, to confer upon his slave a present right of freedom, are demonstrative of the very contrary intention.

We feel constrained, therefore, to reverse the decree, and dismiss the bill.

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R. M. McCLUNG *et al.* v. W. H. SNEED *et al.*

1. CHANCERY PLEADING. *Demurrer, Statute of limitations.* If, by the lapse of time, no right of action exists in the complainant, from his own showing, this may be taken advantage of upon demurer. And this rule applies, *a fortiori*, where, by force of the statute, the title as well as the remedy of complainant are both destroyed.
2. SAME. *Same. Same. Disability.* If it appears, upon the face of the bill, that the land sought to be recovered has been adversely held for more than seven years, under an assurance purporting to convey an estate *in fee, prima facie*, this possession confers on the possessor a good title, by force of the statute of limitations; and if the complainant means to avoid this apparent bar, by any of the disabilities contained in the *proviso* of the statute, it is incumbent on him to allege, in the bill, its existence at the time the cause of action accrued, with such other averments of its continued existence as will show that complainant's right has not been defeated by the statute.

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3. **STATUTE OF LIMITATIONS.** *Husband and wife. Tenancy by the curtesy. Disability.* The principles settled in the cases of *Guion v. Anderson*, 8 Hum., 298; *Miller v. Miller*, Meigs' R., 484, and *Weisinger v. Murphy*, 2 Head, 674, are approved.
4. **WIDOW. Will. Dower.** If the widow of a testator does not dissent from the will of her husband, she is bound by its provisions, and can take no part of his estate, as to which he died intestate. She is not entitled to be endowed of lands not disposed of by his will.

FROM KNOX.

The bill was dismissed by Chancellor LUCKY, upon demurrer. The complainants appealed.

T. C. LYON and T. A. R. NELSON, for the complainants.

J. R. COCKE and HEISKELL, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor, in our opinion, acted properly in dismissing the bill upon demurrer.

The facts of the case are these: Rufus Morgan, the grandfather of the complainants, departed this life in the month of August, 1826, leaving a widow, Elizabeth Morgan, and seven children; and among them, William King Morgan, who died intestate and unmarried, in the year 1829; Rachel K. T. Morgan, who married Hugh L. McClung whilst she was a minor, and departed this life in the month of December, 1842, leaving the complainants, her only children and heirs at law; Eliza Morgan, who was of imbecile mind, and died intestate and unmarried, and Rufus Ann Morgan, who also died in infancy, unmarried and intestate. The said Rufus Morgan, on the 23d of September, 1813, made his last will and testament, which, after his death, was duly proved, and admitted to record in the county of Roane, where he died; and in which he gave his wife, the said Elizabeth Morgan, his entire estate,

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real and personal; and from the provisions of which she did not dissent, as required by the act of 1784, ch. 22, sec. 8; but, on the contrary, was content therewith, as we are bound to believe, from the allegations of the bill.

Subsequent to the making of his will, he acquired the tract of land in controversy, in the vicinity of Knoxville, and which, therefore, as the law then was, did not pass under the will; but as to it, he died *intestate*, and the same descended to his heirs at law.

This tract of land, together with all the other property belonging to the estate of Rufus Morgan, was taken possession of by the said Elizabeth, his widow, and claimed by her until she sold it, under the mistaken impression that said land passed to her under the devise of her husband's will.

In the years 1832 and 1834, by two deeds, the said Elizabeth sold and conveyed this land to Calvin Morgan, who entered upon and took possession thereof, and died in possession of the same, having previously sold a part thereof to the East Tennessee and Georgia, and East Tennessee and Virginia Railroad Companies; and his executor, Calvin Morgan, jr., under a power vested in him by the will of Calvin Morgan, sold and conveyed the remainder of the same to William H. Sneed; and he has sold and conveyed the same, or most of the same, to various persons.

These purchasers and sub-purchasers, now claim title to the said tract of land, and are in possession of the same; and we take it, from the allegations of the bill, that Calvin Morgan, and the purchasers under him and his executor, have held adverse possession ever since the period of his purchase. We can regard them in no other sense; and furthermore, that Elizabeth Morgan's deeds were absolute conveyances. She supposed she was absolute owner under her husband's will, and made deeds accordingly. So the bill, as we think, is to be understood.

We take it, that Hugh L. McClung survived his wife, and is yet alive; as three of complainants, who are infants, sue by him as their guardian; and also, that Elizabeth Morgan is

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yet alive, as she appears to be a defendant in the bill. But it does not appear *when* Rachel, the mother of complainants, became covert, nor at what time her infancy ceased. Nor does the bill allege any period for the deaths of Eliza and Rufus Ann Morgan.

The complainants, if we understand the extent of their claim, seek to recover the one-fourth of this tract of land, namely: one-seventh as heirs of their mother, and in her original right; and one-fourth of three-sevenths in her right as one of the heirs of William King, Eliza and Rufus Ann Morgan, deceased. The bill was filed the 19th of May, 1856.

Upon these facts, we think, complainants are barred by the statute of limitations.

It is a well settled rule of chancery pleading, that if by the lapse of time, no right of action exists in the complainant, from his own showing, this may be taken advantage of upon demurrer. And this rule applies, *a fortiori*, where by force of the statute, the title, as well as the remedy of complainant, are both destroyed. *Dunlap v. Gibbs et al*, 4 Yer. R., 94.

Calvin Morgan, and the defendants who derive title under him, have been in possession of this land more than seven years before the suit was brought, indeed, more than twenty. They have claimed it for themselves, and adversely to complainants. The very nature of the case, as stated in the bill, shows this. *Prima facie* this possession confers on the possessor a good title, by force of the statute of limitations. If the complainants meant to avoid this apparent bar by any of the disabilities contained in the proviso of the statute, such as infancy, coverture, &c., it was incumbent on them to allege, in the bill, their existence at the time the cause of action accrued, with such other averments of their continued existence, as would show that complainants' rights had not been defeated by the statute. *Shropshire et al. v. Shropshire et al.*, 7 Yer. R., 165-167; *South Sea Company v. Wymond Tell*, 3 Pur. Will., 144; *Foster v. Hodgson*, 19 Ves., 182; *Carter v. Murray*, 5 Johns. Ch. R., 530; Angell on Lim., 349.

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This is not done, and we might stop right here. But in our view of the possession, and in every supposed aspect of the case, it may be demonstrated that complainants are barred, unless it be as to their interest in the share of the imbecile child, Eliza Morgan; and as to that, the demurrer was well taken, for the reason already given, namely, that the exception of imbecility is not so stated upon the bill, as to take the case without the statute.

If we assume the fact to be, that Rachel, the mother of complainants, was a *feme covert* in 1832 and 1834, when the cause of action accrued, then the case of *Guion v. Anderson*, 8 Hum., 298, is decisive against them.

That case has been repeatedly sanctioned by this Court as authority. According to its principles, when the adverse possession commenced, no estate by the curtesy existed in Hugh L. McClung, to this land. He was not then seized of a particular interest, or estate, separate from the *fee simple* estate of his wife. By his marriage, he had gained an estate of freehold, in her right, which might continue during their joint lives; and might, by possibility, last during his own life. He was not, however, solely seized, but jointly, with his wife. And his estate, by the curtesy, could not exist, or be consummated, until the death of his wife. The wrongful possession of Calvin Morgan, and the purchasers under him, was an injury to the entire joint estate of Hugh L. McClung and wife, and they were required, jointly, to bring suit to recover the possession. The statute of limitations began to run against both immediately upon such adverse holding; and they having failed to sue for seven years, their joint right of action was barred; and the right of Hugh L. McClung, whatever it may have been, was not only barred, but *extinguished*; and upon the death of Rachel K. T. McClung, the complainants, as her heirs, even though infants, or *femes covert*, had only three years thereafter, within which to bring suit; and having failed to do so, they, also, are barred. They could have sued at any time the right of Hugh L. McClung was barred, his extinguished interest interposing no obstacle to their recovery

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The case of *Guion v. Anderson*, differs widely from *Miller v. Miller*, Meigs' Rep., 484; and *McCorry v. King's Heirs*, 3 Hum. 267. The principle of these latter cases allow the wife, or her heirs, seven years within which to sue, after the death of the husband, because he had made a conveyance of the lands of the wife, she not joining therein, by which he was estopped from suing, and she could not sue alone; so that no cause of action accrued to them, or either of them, during his life. There was, in fact, no wrong or injury. Nor could her heirs, after her death, sue the husband's vendee during the continuance of the life estate, which he had gained by force of the husband's deed, and his survivorship of his wife. The case then become of particular estate and remainder.

And if she were both, an infant and *feme covert*, at the time the cause of action accrued, or only under the disability of infancy, and we even suppose the infancy to continue until her death in 1842, still, by the same authority, complainants only had three years after her death, within which to sue, and are barred. And this is so, as to any interest which she may have acquired in the shares of her deceased brother and sisters; and certainly embraces the share of William King Morgan, who died in 1829.

If, when the cause of action accrued, the children, Eliza and Rufus Ann Morgan, were alive, the former being *non-compos mentis*, and the latter an infant, and they died under these disabilities, either in the lifetime of their sister Rachel, or after her death, then their heirs, whatever may have been their disabilities, must, by the same authority, have sued within the three years, required by the statute. And it is impossible here, to suppose the continuance of infancy as to any of these children from the year 1826, so as to save any of their shares to complainants.

They cannot escape the statute by any right of dower which Elizabeth Morgan may be supposed to have in this land. Nor is it necessary, here, to consider the question in that aspect. In our opinion, she was not entitled to be endowed of this estate, and took no interest therein, either as widow, or dev-

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isee, not having dissented from the will; the settled law of this State is, that she is bound by its provisions, and can take no other part of her husband's estate. *Reid v. Campbell*, Meigs' R., 378-389; *Malone, Adm'r v. Majors*, 8 Hum., 577; *Croven v. Croven*, 2 Dev. Eq. R., 338.

This is so, as to property of which he died intestate. *Malone, Adm'r v. Majors*, 8 Hum., 577.

This view of the case is decisive, and we need not notice the question of jurisdiction which has been debated.

It is true, as argued by the complainants' counsel, that the statute of limitations is matter of defence, and that it cannot operate unless the possession be adverse. Nor can the first section of the act have effect, unless the possession, also, be under some assurance of title, purporting to convey an estate in *fee simple*. But it is not true, as we have seen, that this defence must be by answer, and the deeds and adverse possession there set up and proved. The facts necessary to the defence may, and in this case, in our opinion, do appear in the bill. It is not insisted that the possession has been in any way broken, or interrupted, so as to prevent the bar. And, in our opinion, the terms used in the bill in connection with the two deeds of conveyance from Elizabeth to Calvin Morgan, impart assurances of title in *fee simple*, and possession under them must be taken to be adverse, unless repelled by contrary averment, which is not done, or attempted.

Decree affirmed.

Mary R. Parmenter v. John W. Parmenter.

MARY R. PARMENTER v. JOHN W. PARMENTER.

APPEAL. *Writ of error. Divorce. Code, § 8158.* In divorce cases, an *appeal* is the only mode of revising errors. In such cases a writ of error will not lie; and will be dismissed upon motion.

FROM KNOX.

The complainant filed a bill against her husband, for a divorce and alimony. Chancellor LUCKY pronounced a decree for the complainant. The defendant brought up the cause by writ of error. A motion was entered, by the counsel of the complainant, to dismiss the writ, upon the ground that an *appeal* was the only remedy, in such cases, for the revision of errors.

CROZIER & REESE, for the complainant.

JOHN BAXTER, for the defendant.

MCKINNEY, J., delivered the opinion of the Court.

This is a *writ of error*, brought to reverse a decree in a *divorce* case, by which the marriage was dissolved, and the property of the wife, before the marriage, given back to her. The writ of error was prosecuted by the defendant, and a motion has been made to dismiss it. The motion must be allowed. It is positively declared, in sec. 8158 of the Code, that, "in divorce cases, an *appeal* shall be the *only mode* of revising errors."

This is a proper and necessary provision, intentionally adopted. Much mischief might be produced, if either party—in a case where the bond of matrimony had been dissolved—were permitted at any time within two years after the divorce,

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to obtain a reversal of the decree, after a seeming acquiescence for a time, by declining to appeal, and, possibly, after the other party had again married.

Motion to dismiss the writ allowed.

CAMPBELL & Co. v. REEVES & BREMAN.

1. **FACTOR AND PRINCIPAL.** *Factor has a special property and lien.* A factor has a special property in the goods intrusted to him for sale; and a *lien* on them for his factorage or commission, and may sell the goods in his own name.
2. **SAME.** *Same.* *Factor cannot delegate his authority.* In general, a factor has no power to delegate his authority to another person; it must be executed by him personally, unless authority to substitute another in his stead is expressly or impliedly conferred upon him by his principal.
3. **SAME.** *Effect of a delegation of his power, by a factor.* *Conversion.* *Assumpsit.* If a factor dispose of the goods of his principal, by a delegation of his power to a third person, without the sanction of his principal, or, of a usage of trade, it is a conversion of the goods by the factor, and the principal would have an election either to sue in *trover*, grounding his action on the *tort*; or to waive the *tort*, and recover the value of the goods in an action of *assumpsit*, based upon the breach of the implied contract.
4. **SAME.** *Sub-agent.* *Liability of.* Whenever the authority to appoint a sub-agent exists, a privity is created between the principal and such sub-agent, and the latter will be held directly responsible to the principal. But if no such privity exists, the sub-agent would be responsible to his immediate employer, and the remedy of the principal would be against his agent.

FROM KNOX.

Verdict and judgment for the plaintiffs. LYON, J., presiding. The defendants appealed.

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J. R. COCKE, for the plaintiffs in error.

TRIGG and TEMPLE, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

The defendants in error, residents of Baltimore, made several consignments of *preserved oysters and fruits*, at different times during the year 1854, to the plaintiffs in error, as factors, resident in Knoxville. In the spring of 1855, Campbell & Co., sold and transferred their business to Marley & Ricardi; and, at the same time, turned over to the latter a portion of the consignments which then remained undisposed of. This was done without the knowledge or consent of the consignors. And there is no evidence in the record that Campbell & Co., informed them of the transfer to Marley & Ricardi, or rendered any account of sales, before the institution of this suit. Marley & Ricardi appear, from the proof, to have been prudent business men; and it further appears, that during a period of some two years after the transfer to them, Marley & Ricardi made sales to the amount of \$80; which they remitted to the consignors, who gave a receipt for the same, on account of Campbell & Co. It also appears, that Marley & Ricardi informed the consignors of the transfer of the goods to them, by letter; but at what time this was done, does not appear; nor does it appear that the consignors in any manner sanctioned, or ratified, the act of Campbell & Co., in delivering over the goods to Marley & Ricardi.

His Honor, the Circuit Judge, instructed the jury, that the relation of factor and principal was one of personal trust and confidence. And that, in general, where a consignment of goods was made to a factor for sale on account of the principal, the factor would have no authority to deliver over the goods to a third party for sale, without the assent of the principal, unless some usage of trade to the contrary prevailed, or the act were subsequently ratified by the principal. And that the factor making such transfer—without the previous or sub

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sequent sanction of the principal, and in the absence of any usage or custom of trade—would be liable for the value of the goods thus transferred.

The jury found for the plaintiffs; and the case is brought to this Court by writ of error.

The position assumed by the counsel for the plaintiffs in error, is, that the transfer of the goods by the factors, under the circumstances, did not constitute a *conversion*; and that the value of the goods cannot be recovered in an action of *assumpsit*—which is the form of the present action—but, if at all, only by a special action on the case.

We do not assent to the correctness of this position. It is true, that a factor has a special property in the goods intrusted to him for sale; and a lien on them for his factorage or commission; and he may sell the goods in his own name. But, in general, he has no power to delegate his authority to another person—it must be executed by him personally, unless authority to substitute another in his stead, was, expressly or impliedly, conferred upon him by his principal. Story on Agency, secs. 13, 110, 201.

If, then, the factor dispose of the goods, by a delegation of his authority to a third person, without the sanction of the principal, or of a usage of trade, what is the legal consequence? Clearly, it is a conversion of the goods by the factor. This must necessarily be so. The act being unauthorized, no privity is thereby created between such third person and the principal. Such wrongful act cannot be held to confer on the third person, as respects the principal, the rights, duties, or obligations of the factor himself. Wherever authority to appoint a sub-agent exists, a privity is created between the principal and such sub-agent, and the latter will be held directly responsible to the principal. But, if no such privity exists, the sub-agent would be responsible to his immediate employer; and the remedy of the principal is against his agent. Ibid. 13, 201.

T unauthorized disposal of the goods by the factor, being a conversion, it clearly follows that the principal has an elec-

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tion either to sue in trover, grounding his action on the *tort*: or, to waive the tort, and recover the value of the goods in an action of assumpsit, based upon the breach of the implied contract.

Judgment affirmed.

W. F. RANKIN v. T. & W. EAKIN & Co.

1. **PRINCIPAL AND AGENT.** *Special agency.* An agent constituted for a particular purpose, and under a limited power cannot bind his principal if he exceed that power. The special authority must be *strictly* pursued.
2. **SAME.** *Same.* *Power of attorney to confess judgment.* If a party constitute another his agent, by written authority, to confess a judgment in his name; and limits his authority as to time and place, or in other respects, the attorney in fact, or agent, cannot transcend the power conferred and bind his principal. He cannot confess the judgment at a different time than that authorized in the power.

FROM BLEDSOE.

Judgment was confessed by an attorney in fact for the plaintiff in error, before Judge GARDENHIRE. The cause was brought up by Rankin.

BURCH & MITCHELL, for the plaintiff in error.

FRAZIER & HYDE, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

Rankin authorized Frazer, in writing, to confess a judgment against him in favor of T. & W. Eakin & Co., for what-

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ever might be found due upon a note given by him to Acuff for \$600, and assigned to said Frazer for the use of Eakin & Co., in the Circuit Court of Bledsoe county, at the *March Term*, 1857. Under this power, Frazer confessed judgment against Rankin for \$488.19, the balance found to be due on said note, at the *August Term of said Court*, 1858. Rankin assigns for error. that there was no authority for this confession; and that is the only question.

The Code, at sec. 2978, authorizes judgments to be confessed and rendered upon written authority. But still the question remains, can it be done after the time specified in the power? This must depend upon the general rules of agency.

With reference to the distinction between general and special agencies, this is special and limited. It is not only confined to a special and particular act, but it is limited to a particular time. An agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. 2 Kent, 420; 1 Am. Lead. Cases, 524; 2 John. R., 48. In this last case, an authority to sign a note for \$250 at six months, was held not to confer power to sign it at sixty days.

In this case, a particular time was expressly fixed for the performance of the act, and the power was not then exercised, but was more than a year afterwards. A man might be very willing to have a judgment against him now, but the lapse of twelve months may have produced such a change of circumstances, as to make him very unwilling that it should be then done. What defences may have arisen in the mean time we cannot tell. At all events, a party has a perfect right to judge of this for himself, and put such restrictions and limitations upon the agency constituted, as he chooses, and the authority given must be strictly pursued, or he is not bound. If the authority had been general as to time, to confess judgment on the note, that would have bound him until revoked. But it was confined, expressly, to a certain term of the Court

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and if not *then* exercised, it expired. We have been referred to no authority to sustain such a departure from the limitations of a special power, or agency, and we are not aware that any such exist, or of any principle that would authorize it. But it is said the time was not material, and the delay has operated in favor of the principal. We do not know how that may be, but let it be as it may, it cannot aid us in the question of construction of the power. The principal saw fit to limit the time of exercising the power conferred, and we cannot depart from that.

The judgment must, therefore, be reversed.

THE STATE v. ABE HATFIELD.

CRIMINAL LAW. *Grand juror. Witness. Code, § 5089.* The provision of the Code, § 5089, exempting a witness from a prosecution for any offence in relation to which he has testified before the grand jury, does not extend to and embrace a grand juror, who communicates to his fellow jurors his knowledge of a crime having been committed; and in doing so, voluntarily, implicates himself in the act.

FROM SCOTT.

The defendant was discharged upon a demurrer to the plea in abatement, GARDENHIRE, J., presiding. The State appealed.

HEAD, Attorney General, for the State.

HUMES, MYNOTT and SCOTT, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

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A presentment was made against the defendant for selling spirituous liquors on Sunday. There was a plea in abatement, to which the Attorney General demurred; and on argument, the demurrer was overruled, and the defendant discharged. The Attorney General appealed in error, for the State.

The plea is informal, and scarcely intelligible; the question intended to be raised, however, is this: If a person, in the capacity of a grand juror, communicate to his fellow jurors the fact—within his personal knowledge—that another person was guilty of the offence of selling spirituous liquors on Sunday; and, in doing so, voluntarily implicates himself in the act, or in a similar offence;—is he subject to prosecution for the offence of which he thus confessed himself guilty?

It was supposed by the Circuit Judge that this case is within the spirit of sec. 5089 of the Code, which declares—that “no *witness* shall be indicted for any offence in relation to which he has testified before the grand jury.”

We do not concur in opinion with his Honor the Circuit Judge.

In general, all persons possessed of the legal capacity to commit a criminal offence, are amenable to prosecution and punishment. To this general rule, some exceptions have been made, by positive law, founded upon obvious reasons of policy, justice, or fundamental law. One of these exceptions is contained in the foregoing section of the Code. This exception is to be construed strictly. The term “witness,” must be understood in the legal sense; and, as is obvious from the context, can only be applied to a person brought before the grand jury, by compulsion, to testify against others. Such person cannot be compelled to criminate himself; but, as an inducement to a full and unrestrained disclosure in regard to others, without peril to himself, it was deemed politic—in the event of his doing so—to exempt him from prosecution. Neither the letter nor spirit of this particular exemption, applies to the case of a *grand juror* who voluntarily criminate himself.

In this view, the demurrer should have been sustained. It should also have been sustained, on the ground that the plea

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is repugnant, insensible, and defective both in form and substance.

Judgment reversed, demurrer sustained, and case remanded that the defendant may answer over.

LEWIS GUTHMAN v. M. C. PARKER.

1. **GAMING.** *When the thing wagered may be recovered.* In gaming contracts, when the impending event is undecided, and after the event as against a stakeholder, who has been notified not to pay the thing lost to the winner, and as against the other party who receives the wager after such notice to the stakeholder, the owner may disaffirm the contract and recover his property.
2. **SAME.** *Limitation.* *Act of 1799, ch. 8, § 4.* The act of 1799, ch. 8, § 4, limiting suits brought for the recovery of money or property lost at gaming, to ninety days from the payment or delivery thereof, has no application to cases where the contract is disaffirmed, and notice given not to deliver the wager.

FROM MONROE.

A wager was made between the plaintiff in error and the defendant upon the last Presidential election. The plaintiff in error proposed to take \$100 for a watch he had, payable when Buchanan carried Tennessee for President. The defendant in error accepted the proposition, and the watch and \$100 were placed in the hands of one Taylor, as stakeholder, until the event of the election was ascertained. Before the election was held, and before the result was known, the defendant in error notified Taylor not to pay over the money, on the ground that the watch was not such as was represented. After the result was ascertained, the plaintiff in error applied

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to the stakeholder for the money, when he was informed that notice had been given not to pay the money over. The money was again demanded, and the stakeholder paid it over. The money was paid more than ninety days before the suit was brought. The watch was not worth more than \$65.

The Court below charged the jury, that if the plaintiff in error received the money, knowing the stakeholder was notified by the plaintiff not to pay it over to him, he received it wrongfully, and the plaintiff was entitled to recover in this action to the amount of \$50, notwithstanding it may have been received more than ninety days before suit was brought. Verdict and judgment at the May Term, 1859, SWAN, J., presiding, for the plaintiff. The defendant appealed.

HALL, for the plaintiff in error.

BROWN and COCKE, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

The principle of the cases of *Perkins v. Hyde*, 6 Yer., 288, and *Allen v. Dodd*, 4 Hum., 131, governs this. In wagering contracts, when the impending event is undecided, and after the event, as against a stakeholder who has been notified not to pay the thing lost to the winner, the owner may come and disaffirm the contract, and recover his property. This is so, upon common law principles, which allowed him to repent, pending the event and before the illegal contract was executed. Parker here, before the election, disaffirmed the contract, and notified Taylor, the stakeholder, not to pay over the money deposited; and of this he notified Guthman. And yet, in defiance of this notice, he received the money from Taylor. He cannot be permitted to retain it, and must, upon the authority of the above cases, be held to have received it to the use of Parker.

In this view of the case, it is obvious the act of 1799, ch. 8, sec. 4, limiting suits brought for the recovery of money or

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property lost at gaming to ninety days from the payment or delivery of the property, can have no application. The action rests upon common law principles; and so the cases of *Perkins v. Hyde* and *Allen v. Dodd* hold.

There is nothing in this record to show that Parker ever received the watch, or where it is; nor is any question made in reference to it. We are therefore relieved from considering, what effect, if any, it would have upon the action, if it appeared he still retained it, and had not offered to restore it to Guthman.

The judgment of the Circuit Court will be affirmed.

JOSEPH HUMPHREYS v. LEVI MCCLOUD.

1. **EVIDENCE.** *When conflicting. Chancery.* If the complainant, who is actor, fails to make out his case by sufficient proof, he is not entitled to the interposition of the Court in his favor.
2. **SAME.** *Same. Same. Compromise.* If the terms of compromise of a suit pending in Court, are not put in such form as to preclude all future controversy as to the true import of the agreement, this negligence cannot be made a ground upon which to invoke the active interference of a Court of Equity.
3. **CHANCERY JURISDICTION.** *Interference with compromises made in the legal forum.* Investigation into the terms of adjustment of suits in the legal forum, where there is a disagreement as to them, are to be discouraged by a Court of Equity—being from their nature incapable of a satisfactory determination, and do not tend to enhance the moral influence of the administration of justice, or to elevate the profession, in the eyes of the community.

FROM KNOX.

Decree in the Court below for the complainant, LUCKY, C., presiding. The defendant appealed.

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CROZIER & REESE, for the complainant.

TEMPLE and COCKE, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

Injunction bill. The case is this: An action of slander was brought by McCloud against Humphreys, in the Circuit Court of Knox. The case came on for trial at the June Term, 1857. Before proceeding to trial, the counsel of the respective parties most laudably interposed to effect an adjustment of the matter, being impelled to do so, by the shockingly disgusting character of the charge, and the relation existing between the parties; the defendant being the son-in-law of the plaintiff. A compromise was made, in pursuance of which the case was disposed of. And out of a subsequent disagreement between the parties, respecting the terms of the compromise, this suit in equity has arisen.

It is agreed, that, by the terms of compromise, judgment was to be entered up against Humphreys for \$500 damages, and costs of suit. The costs to be secured; and, accordingly, the latter confessed judgment for that amount, and secured the costs.

But the bill alleges, that it was a distinct and positive term of the agreement, that McCloud should enter a *release* of the judgment for \$500 at the following term of the Court; it being expressly understood, that, in no event, was the money to be collected. This allegation is expressly denied in the answer. The defendant states, in substance, that it was left entirely optional with him, to release said judgment, or to refuse to do so; according to the future conduct and deportment of Humphreys toward him.

It seems that the adjustment was made through the counsel of the parties, who were examined as witnesses, and their statements differ as widely as the allegations of the parties; various other witnesses were examined, whose statements are alike conflicting.

The presiding Judge, and the clerk of the court were ex-

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amined; neither of whom heard anything in relation to a release of the judgment. The confession of judgment as entered up, is absolute and unconditional. This is not a case for the interposition of a Court of Equity.

It presents a somewhat remarkable instance of an honest, and unintentional misunderstanding as to a matter of fact, between the parties; and especially so between counsel, who are gentlemen of the first standing, and whose conduct in the matter seems to have been prompted by motives highly creditable to them as members of the profession.

The directly contradictory allegations of the parties, are equally supported by witnesses of the highest claims to credit, and possessed of equal opportunities of knowing the facts. There is no principle, or rule of evidence, upon which the testimony can be reconciled; nor is there any such preponderance, on either side, as to enable the mind in search of truth, to determine how the fact is. The case must, therefore, be governed by the general principle, that the complainant, who is actor, having failed to make out his case by sufficient proof, is not entitled to the interposition of the Court in his favor.

Again: It was the fault of the complainant that the evidence of the terms of adjustment, was not put in such form as to preclude all future controversy as to the true import of the agreement. And this negligence cannot be made a ground upon which to invoke the active interference of a Court of Equity. And furthermore, we have had occasion to say, heretofore, that such investigations as the present, are to be discouraged by a Court of Equity. They are, from their very nature, incapable of a satisfactory determination; and, more than this, they do not tend to enhance the moral influence of the administration of justice, or to elevate the profession in the eyes of the community.

We are of opinion, therefore, that the Chancellor erred in decreeing for the complainant; and the decree will be reversed, and the bill dismissed, but without costs.

Willis Warwick v. Washington Underwood.

WILLIS WARWICK v. WASHINGTON UNDERWOOD.

1. **JUDGMENT.** *Effect of. Trespass quare clausum fregit.* The judgment in an action of trespass *quare clausum fregit* is conclusive upon the parties to the suit, and their privies, upon all matters put in issue in the suit, and may be plead in bar of a subsequent suit touching the same matters.
2. **SAME.** *How relied on as a defence.* A judgment is equally conclusive as to the matters adjudicated when offered as evidence, if admissible, as if pleaded in bar as an *estoppel*.
3. **SAME.** *Same. When parol evidence admissible to show what was in issue.* Where the former judgment is general and uncertain, parol evidence is admissible to show what was involved in the issue and settled by the judgment.
4. **SAME.** *Question reserved.* Is the judgment in an action of trespass *quare clausum fregit*, when the title is put in issue, a bar to an action of ejectment for the same land?

FROM ANDERSON.

This cause was tried before Judge BROWN, and a verdict and judgment were rendered for the plaintiff. The defendant appealed.

CROZIER & REESE, MAYNARD & WASHBURN, for the plaintiff in error.

TRIGG, HALL, and ARMSTRONG, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This was an action of trespass to his freehold, brought by Underwood against Warwick, in which he recovered a small amount of damages. The main contest was upon the title—that being the principal issue in the case, and the object of the suit.

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The case is not fully presented to us, neither as to the facts proved nor the charge of the Court, but it was only intended by the parties to state enough in the bill of exceptions to raise two questions of law upon the charge of the Court.

The two parties owned adjoining tracts of land, and the question of difficulty in the case was, on which side of the dividing line between them the spring near said line, and where the trespass was committed by Warwick, was located. It was proved by the surveyor, and perhaps the fact is not controverted, if the line be run according to the trees called for as corners in Warwick's title papers, and along the foot of the ridge as designated in the deeds, the spring would fall on Underwood's side, and that would support the verdict. Warwick bought of Johnson, he of Long, and Long of Prichard. Warwick adduced proof tending to show that there was a marked line varying from the calls of his deed, but in reasonable conformity to them, which was shown to him when he bought, and to his vendor before him, to which they claimed, and by which the spring would be thrown on his side of the line. The Court was requested to charge, that if this state of facts was established to the satisfaction of the jury, they should find for the defendant. But the Court refused, and charged "that if the defendant's deed called for the foot of the ridge, he would be controlled by that, unless it was shown that Underwood and those he held under, had recognized that line" so marked and claimed by Warwick and his vendors. There is no error in this. The calls in the deeds for natural objects would certainly have to prevail, although a different line had been marked and claimed, unless it had been acknowledged or acquiesced in by conterminous claimants, when there was no actual possession. It is not a question of re-marking, but the change of a line by the acts and understanding of one side, without the concurrence of the other. This cannot be done.

The other question is in relation to the effect of a former trial and judgment between the same parties, with their position as parties reversed. In that suit, brought by Warwick

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against Underwood for trespass, at or near the same place, it was determined that the spring was on his side of the line, upon an issue on the plea of *liberum tenementum*, and he recovered damages.

It is insisted that this judgment was conclusive upon the title, and operated as an estoppel upon Underwood, and must defeat his present action. Upon that point the Court charged, "that if the spring in controversy in this case was described in the declaration in the former suit, the judgment in that cause would be conclusive that the title was in Warwick; but that if the spring was not in the boundary *described in the declaration*, that the judgment in that case would not be a bar to this."

This instruction is as it was requested by Warwick's counsel, except the words in italics. To that qualification, exceptions are taken by plaintiff in error. The title papers used in the former and present cases are the same, and so is the place of the trespass.

The Court was right in holding the former judgment conclusive upon the same parties as to the title that was put in issue and tried in that suit as well as this, and the place of the trespass the same. This is well settled in our own cases, and we need not go beyond them for authority. 1 Meigs' Digest, sec. 907. By our cases, also, the vexed question upon which the decisions of other Courts and opinions of writers are variant and conflicting, as to the different effect to be given to this defence when not pleaded, but only offered in evidence under the general issue, is put to rest. Judgments are held to be equally conclusive of the fact or point directly adjudged when offered as evidence, if admissible, or if pleaded in bar as an estoppel. *Same* authorities.

But our cases also hold that where the former "judgment is general and uncertain, parol evidence is admissible to show the fact or issue tried and involved in the general judgment." *Same*. Upon this rule the only difficulty arises in the case before us. There was parol proof in this case tending to show that, in the former suit, the question of fact as to the

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location of the line by marks and acquiescence variant from the calls in the deeds, was tried and passed upon by the jury in favor of Warwick, upon an appropriate plea involving that issue, and, consequently, that fact is settled in the general verdict and judgment. It is not material on this point whether the finding of the jury was right or not in the former suit. That cannot be questioned any more between the same parties or their privies. Right or wrong, the question was finally closed, unless a new trial had been obtained in the same suit. This rule is not alone for the benefit of the parties litigant, to put an end to strife and contention between them, and produce certainty as to individual rights, but it is also intended to give dignity and respect to judicial proceedings, and relieve society from the expense and annoyance of interminable litigation about the same matter.

The condition upon which the Circuit Judge gave finality to the former adjudication, defeated entirely the object of the rule. He said, "if the spring was not in the boundary described in the declaration" of Warwick in the former suit, then "the judgment in that case would not be a bar to this." That was plainly opening the whole question of boundary again, because the jury would have to determine, by a re-examination of the facts, whether the spring was within the lines claimed by Warwick in his declaration in the former suit, in order to decide whether that judgment was a bar or not. That was the precise fact before tried and closed, and should not have been again opened. The charge should have been, that if, by the former verdict and judgment, the line between the parties had been found so as to throw the spring on the side of Warwick, Underwood was estopped from controverting that fact in this suit. It was not material to that question whether their finding was governed by the calls of the deed, or upon evidence showing that in some legal mode the dividing line was varied from the calls, and located at a different place. The fact that the line was so found by the former jury, was enough to give effect to that finding as a bar, without regard to the kind of evidence upon which it was done,

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or whether it was correctly done or not. But, by the charge, the jury were instructed to go back and ascertain if the previous jury had found the line described in the declaration in that case to include the spring; and if *that* did not, then, although the true line might have been found to vary from that described, and, as thus found, included the spring, it would not have the effect to close the question. This was all wrong.

There could not, perhaps, be a better case to illustrate the wisdom of the rule in question than the one before us.

Warwick sued Underwood for a trespass, and the titles were put in issue, and decided in favor of the plaintiff, and damages given for the injury to his freehold. Then, and without delay, Underwood brings his action for a trespass upon the same land and place, and, by the verdict of a second jury, he turns the tables, and is allowed to recover damages against Warwick, upon the ground that the same land is his, upon the same title papers. What would be thought of the law and the administration of justice if this kind of game could be successfully played in the Courts?

It is said that Underwood was not bound to show the strength of his title and his proof in the other suit on the question of freehold, or that he may have acquired a better title since, and therefore should not be concluded. If that were so, all the evils intended to be avoided by the rule would continue to exist in an aggravated form. This would be trifling with the courts of justice, and cannot be tolerated. Every question raised by the issues in a case, or in some cases, all which might have been legitimate, are considered as closed by the verdict, and that forever, as to the same parties.

The maxim that there must be an end to litigation, was dictated by wisdom, and is sanctified by age.

We do not say that a decision upon the title in trespass would be a bar or estoppel in ejectment; that question is not involved, and we leave it open for a case in which it may arise.

The judgment will be reversed for this error, and a new trial granted.

John Harman v. The State.

JOHN HARMAN v. THE STATE.

1. **EVIDENCE.** *Assault and battery. Character of the prosecutor.* On the trial of an indictment for an assault and battery, the character of the party assaulted is not admissible as evidence, except when involved in the *res geste*.
2. **SAME.** *When character a part of the res geste. Self defence.* When it is shown that the defendant was under reasonable fear of his life or great bodily harm, from the prosecutor, the prosecutor's temper, in connexion with previous threats, is sufficiently part of the *res geste* to go in evidence as explanatory of the state of defence in which the defendant placed himself.
3. **SAME.** *When the proposition embraces legal and illegal evidence.* If a party proposes to introduce certain proof, and his proposition contains an admixture of illegal matter, with legal, it justifies the Court in rejecting the evidence altogether.

FROM GREENE.

The defendant was convicted in the Court below, PATTERSON, J., presiding. He appealed in error.

T. D. & R. ARNOLD, for the plaintiff in error.

HEAD, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

The plaintiff in error was convicted of an assault and battery, and has appealed to this Court.

Upon the trial in the Circuit Court, he offered to prove that Alexander Sevier, the prosecutor, upon whom the assault had been made, was an overbearing and tyrannical man, that his revenge could not be conciliated, and no lapse of time could efface it; that he was continually in the habit of going armed; that he was not only a dangerous man, but almost without an

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equal as a desperado and bully; that he was then and had been, for years, a terror to the peaceable inhabitants of the town of Greeneville; that he had knocked men down with bludgeons; had thrown and struck them with bricks, and stabbed them with knives, when they did not know that he was present; that he had no regard for law or punishment, and was often confined in jail; and that many of the citizens of Greeneville, who were not able to defend themselves from his attacks, had suffered from his violence. It was also offered to be proved, that the plaintiff in error knew all these things; and the object of the evidence was stated to be, that the jury might judge of the circumstances under which the defendant was placed, and whether or not he was in danger, and had good reason to believe he was in danger of great bodily harm; and to be taken with the other facts in the case, in ascertaining whether, or not, the defendant acted in self-defence. But the Circuit Judge rejected this evidence. In this we think there was no error.

In an indictment for an assault and battery, the character of the prosecutor, can, as we apprehend, never be made a matter of controversy, except when involved in the *res gestæ*; since the fact that he may be an overbearing, tyrannical and dangerous man, in the habit of assaulting *others*, furnishes no legal excuse to the defendant to assault him. The defendant may prove that he was acting in self-defence; or, he may exhibit whatever provocations were given to him by the prosecutor; but he cannot set up general reputation, or the conduct of the prosecutor towards *others*, as a defence. When, however, it is shown that the defendant was under reasonable fear of his life, or great bodily harm, from the prosecutor, the prosecutor's temper, in connexion with previous threats, &c., is sufficiently part of the *res gestæ*, to go in evidence as explanatory of the state of defence in which the defendant placed himself. Wharton's Am. Cr. Law, 234-5; *State v. Tilly*, 3 Ird. R., 424; *Wright v. The State*, 9 Yer., 342.

The defendant had the benefit of the proof of the prosecutor's threats, and if he had confined his proposition to evi-

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dence of his temper merely, it seems, from the foregoing authorities, the proof would have been relevant and admissible. But this he did not do; but extended his proposition far beyond this, into an inquiry as to the numerous assaults he had made upon *others*. This admixture of illegal matter put his entire proposition at fault, and justified the Circuit Judge in its rejection altogether.

Affirm the judgment.

SMITH & LACKEY v. THE MAYOR AND ALDERMEN OF KNOXVILLE.

1. CORPORATION. *Powers. Constitutional law.* A corporation can pass no by-law inconsistent with the constitution and laws of the State. Its by-laws must, also, be reasonable, and not oppressive. Subject to these restrictions, the power to make by-laws and enforce them by penalties, exists in all municipal corporations.
2. SAME. *Same. Case in judgment.* The Mayor and Aldermen of the city of Knoxville passed an ordinance requiring all houses kept for the retailing of spirituous liquors, to be closed at nine o'clock P. M., and prohibiting all sales of liquors after that hour, &c. *Held*, that this is a police regulation for the good order and quiet of the city, and within its corporate powers—that it is not in conflict with the constitution and laws of the State, and may be enforced.

FROM KNOX.

This cause was tried before Judge BROWN, upon an appeal from a Justice's judgment. Verdict and judgment for the plaintiff. The defendant appealed

MAYNARD & WASHBURN, for the plaintiffs in error.

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HUMES and COCKE, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This was an action by warrant, to recover from Smith & Lackey the penalty of ten dollars, for the violation of the following city ordinance:

"Be it ordained, That from and after the 1st of April, 1855, all houses kept for the retailing of spirituous liquors, shall be closed at 9 o'clock P. M., and all sales of liquors after that hour in such house, shall be deemed unlawful; and any person violating this ordinance, shall be subject to a fine of ten dollars for each and every such offence."

The case is rather imperfectly made out in the bill of exceptions, upon the facts, but the circumstances proved are sufficient to make out the charge in the warrant. The deputy marshal proves that, after 9 o'clock, he went into the "*saloon* of defendants," saw a man drinking at the "*bar*," and one of the defendants "handed liquor to the person drinking," though he saw no money paid; the front door was closed, but not locked; the town clock had, just before he entered, struck nine. It is proved then, that the defendants occupied a *saloon*, had a *bar* in it, and handed out liquors for persons to drink. From these facts unexplained, it is difficult to see how any one could doubt that the defendants kept a house "for the retailing of spirituous liquors," in the language of the ordinance. There is another position taken upon the facts, in reference to the ordinance, as construed by the court. The door was closed as required, and that, it is argued, was a full compliance. On the other side, it is contended that the only sensible construction is, that it means, that not only the door, but the business, must be suspended at the hour designated. This must certainly be so, or the law would be nugatory. But if such were not the proper construction, it would not help the defendants, as the ordinance goes further, and prohibits the sale of liquors after that hour.

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But it is presumed that the question intended to be seriously made in this case, is upon the validity of the ordinance itself.

The objection taken to it is, that the defendants were licensed retailers of spirits, under the act of 1846, and having complied with all the provisions of the law, and paid the State and county, and corporation, for the privilege, there is no power in the corporation to abrogate, or even abridge or limit that right to any particular days or hours, as they are entitled to the whole time, and all hours, both in the day and night, to exercise and make profitable the privilege they have purchased with their own money, and for which they hold the license of the State. This is supposed to be a question not entirely free of difficulty; and a very plausible argument has been submitted to us in favor of the position. But it is said on the other side, that in order to raise that question, it must be shown by the defendants that they are licensed tipplers, which they have not done. We take it, that fact sufficiently appears, not by the production of the license, but the circumstances of the case. The ordinance could only have been understood to apply to licensed tipplers, as it could not be presumed that any other houses would be kept in the city for retailing liquors against the general law, or, at least, this regulation could not have been intended to refer to such, for it recognizes the right to sell with open doors at all other hours. It must, then, be taken as admitted by the plaintiffs by the institution of this proceeding under their ordinance, that the defendants were licensed tipplers. Therefore, the point debated, is fairly made by the record.

This is a police regulation, for the good order and quiet of the city. It is literally within the letter of the corporate powers, as set forth in the charter of this, as well, perhaps, as all other towns and cities. It does not follow, because the State has granted a privilege to a citizen, that the exercise of it may not be regulated by the corporate authorities. Ordinances for these purposes have been constantly made and enforced. It is no infringement of the State authority. It is implied that the party licensed is to be subject to the municipi-

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pal regulations of the town in which he may exercise his privilege. It is a condition understood, if not expressed. The same power which licensed him to exercise his trade, gave to the incorporated towns the authority to prevent nuisances, and regulate tippling houses.

In the case of *Robinson v. The Mayor and Aldermen of Franklin*, 1 Hum., 162, the power is admitted to restrain and regulate licensed tipplers in the exercise of this privilege, "so as to mitigate the evils of his trade," though the ordinance in that case was held to be invalid, because it prohibited the selling under a heavy penalty without license from the corporation, and this was thought to be inconsistent with the laws of the State.

It is a correct principle, that a corporation can pass no by-law inconsistent with the constitution and laws of the State. *Angel & Ames*, 182-188. A by-law must also be reasonable, and not oppressive. *Same*, and 2 Kent, 296; *Mayor and Aldermen of Columbia v. Beasley*, 1 Hum., 241. Subject to these restrictions and limitations, the power to make by-laws abides in all municipal corporations, and may be enforced by penalties.

In the ordinance under consideration, we see nothing oppressive or violative of the constitution or laws of the State. The license privilege is not prohibited, but regulated in its exercise by a reasonable and proper restriction.

It must be left to the corporate authorities to determine what restrictions upon this trade are required for the general good; and unless they are unreasonable or oppressive, they are valid, and will be maintained. No man can be permitted to exercise, or use any of his rights, to the unnecessary injury of others, and much less whole communities.

We, therefore, consider this a legal and valid ordinance, and affirm the judgment, enforcing the penalty.

Archibald Murphy v. The State.

ARCHIBALD MURPHY v. THE STATE.

1. **CRIMINAL LAW.** *Usury.* The gist of the offence of usury under our statute is the *reception of the money*. The mere contract or agreement for the payment of more than the legal rate of interest, is not of itself, while unexecuted, the subject matter of a criminal prosecution. And if the parties, in order to *evade* the law, go into another State and make the contract of loan; and the usurious interest is, afterwards, received in this State, a criminal prosecution will lie.
2. **SAME.** *Same.* But if a contract is *bona fide* made in another State, for the payment of money, the rate of interest will be governed by the law of the State in which the contract is made; and in such case, the reception of the money in this State—though the rate of interest may have exceeded that prescribed by our law—would not be usury.
3. **EVIDENCE.** *Usury. Production of the note.* In a criminal prosecution for *usury*, it is not necessary to produce the note, in evidence, given for the loaned money. The note, if produced, may not show the *usury*, and it must be made to appear by extrinsic parol evidence.

FROM SCOTT.

The defendant was found guilty before Judge GARDENHIRE, and appealed.

W. Y. C. HUMES, for the plaintiff in error.

HEAD, Attorney General, for the State.

McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted of *usury*, in receiving two dollars for the use of twenty dollars, for the period of twelve months. The borrower and lender were both residents of this State. To evade the statute—as we must infer—they crossed over the line into the State of Kentucky; and in the latter State, went through the formality

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of the delivery of the money by the lender to the borrower, and also of reducing the contract to writing, in the form of a note; and then returned to their respective homes in this State, where the usurious interest was received by the defendant.

The note was not produced on the trial, and to this exception was taken by the defendant. There is nothing in this exception. The note, if produced, would not have shown the *usury*; of necessity, therefore, it must be made appear by extrinsic parol evidence.

The subterfuge of going into Kentucky to consummate the loan, can be of no avail. The *gist* of the offence of usury, under our statute, is the *reception of the money*. The mere contract or agreement, for the payment of more than the legal rate of interest, is not of itself, while unexecuted, the subject matter of a criminal prosecution. The fact that the contract was made in Kentucky, is, therefore, altogether irrelevant in this case; the offence being complete, from the fact that the usurious interest was actually paid, and received by the defendant, in this State. The agreement must be regarded,—upon the facts of this case,—as having been made in this State; and it must also be understood that the money was to be paid here. The statute cannot be evaded, or *cheated*, by the artifice resorted to by the defendant.

It is certainly true, that if a *bona fide* contract for the payment of money at some place in the State of Kentucky, had been entered into, the rate of interest would have been governed by the law of that State; and in such case, the reception of the money in this State—though the rate of interest may have exceeded that prescribed by our law—would not have been usury. But such is not the present case.

Judgment affirmed.

William G. Swan v. J. C. Hodges.

WILLIAM G. SWAN v. J. C. HODGES.

1. **BILLS AND NOTES.** *Demand and notice. What sufficient demand. Banking hours.* The presentment of a bill or note for payment, must be made within reasonable hours during the day; and should be made during the usual hours of business. Business hours, however, except in the case of banks, include the whole day, unless there be some known custom or usage of trade to the contrary. And as the general usage of banks is to limit their business transactions to certain hours, a presentment, or demand, out of banking hours, is not sufficient.
2. **SAME.** *Same. Waiver of demand and notice.* If the indorser, before or at the maturity of the note, has protected himself from loss by taking¹ adequate collateral security, or, by accepting an assignment of *all* the maker's property—though it be inadequate to meet the liability upon the indorsement—it is a *waiver* of the legal right of the indorser to require proof of demand and notice.
3. **SAME.** *Same. Same.* But the taking of a security or indemnity by an indorser, after the note *has become due*, under a mistaken impression or belief that he is legally bound to pay the note, will not bind him if there has not been a due presentment, and notice of the dishonor.
4. **DEED.** *Takes effect from delivery. Date not essential.* The date is not an essential part of a deed. The deed will be good, although it may have no date, or a false or impossible date, and will take effect from the real time of delivery.

FROM KNOX.

This cause was tried before Judge TURLEY. Verdict and judgment for the plaintiff. Swan, the endorser, appealed.

CROZIER & REESE, and KING, for the plaintiff in error.

LYON, COCKE, SCOTT, and MYNOTT, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

William G. Swan v. J. C. Hodges.

This was an action of assumpsit, against the makers and indorsers of a promissory note, made by Castellaw & Marley, payable to William G. Swan, the plaintiff in error, and indorsed by him for the accommodation of the makers; and in like manner indorsed by John Williams and J. L. Dixon.

Judgment was rendered in favor of Williams and Dixon, and against Swan, jointly with the makers. Swan, alone, prosecuted an appeal in error.

The note was for \$2,000, payable four months after date at the Branch of the Union Bank at Knoxville, and it matured on the 15th of September, 1857—that being the last day of grace. No sufficient demand of payment was made, or notice of the dishonor of the note, given to the indorsers. It is true, there is set forth in the bill of exceptions what purports to be a regular protest of the note; together with a certificate of the notary, that he gave due notice to the indorsers, of the dishonor of the note. But, by agreement of the parties, the statement of the notary, in regard to the time and manner of the demand of payment, and notice to the indorsers, was received as evidence to the jury. The notary states, that on the last day of grace, namely, the 15th of September, 1857, after banking hours, the note was placed in his hands, by Hodges, for the purpose of presentment for payment. That on his way to the bank, he saw Mr. Campbell, the teller and acting cashier of the bank, at the window of one of the offices in the court-house; and then and there, without going to the bank, made demand of payment of the note of him; and was answered, that no funds had been provided for the payment thereof. Supposing this to be sufficient, the notary, on the same day, delivered a written notice to Swan, and the other indorsers, informing them, respectively, that the note had been duly protested, *on that day*, for non-payment.

It is clear that this demand was not sufficient to charge the indorsers. Presentment for payment must be made within reasonable hours during the day, and should be made during the usual hours of business. Business hours, however, except in the case of banks, include the whole day, unless there be

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some known custom or usage of trade to the contrary. And as the general usage of banks is, to limit their business transactions to certain hours, a presentment, or demand, out of banking hours, is not sufficient. Byles on Bills, (Ed. of 1856,) 278, top. Story on Prom. Notes, 226.

Such is the weight of authority, though there are some American cases at variance with the rule as above stated. See Byles on Bills, 278, note 1.

It was conceded, on the trial in the Circuit Court, that the note was not duly dishonored; and on this ground the two last indorsers were held to be discharged. But as to Swan, it was held, that there had been a waiver of demand and notice, by force of an indemnity alleged to have been taken from the makers, by him.

It appears that a deed of trust was executed by Castellaw & Marley, by which they assigned certain property and effects, therein described, to J. C. Ramsey, as trustee. It is recited in the deed, that William G. Swan was the accommodation indorser, for the makers of said deed, of three several notes, one of which is the note sued on; and in describing said note it is stated, that it "*became due yesterday and was protested.*"

The trustee is required to proceed forthwith to make sale of the property, and to collect the debts assigned to him, "with a view to pay up and discharge the liabilities of the said Castellaw & Marley above mentioned, indorsed as hereinbefore stated, by the said Wm. G. Swan."

It appears that the assignment was made at the instance, and with the approbation of Swan, and that he was present when the deed was executed.

The deed bears date the *fifteenth day* of September, 1857—the same day on which the note was payable—but it is manifest from the whole case, that it was not executed or delivered until the day after. It was not acknowledged until the 16th, although all the parties resided in Knoxville. In the *heading* of the trustee's account of the administration of the trust, it is stated that his appointment as trustee, was on the *sixteenth*.

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But upon the face of the deed this question is put to rest. The recital—that the note “became due yesterday, and was protested,” being repugnant to the date, must prevail, The *date* is not an essential part of a deed. The deed will be good although it have no date, or a false or impossible date; and will take effect from the time of delivery. 2 Bl. Com., 304. The date may, therefore, be rejected whenever it differs from the real time of delivery. But the positive statement of the matter of fact, in the body of the instrument, that the note fell due and was protested on the day preceding the making of the deed, cannot be thus treated; and it must be taken as conclusive of the fact, that the assignment was not made until the day after the note was payable.

And this brings us to the question, whether or not Swan's acceptance of this assignment amounts to a waiver of demand and notice. The principle is well settled, that if the indorser, before, or at the maturity of the note, has protected himself from loss, by taking adequate collateral security, or by accepting an assignment of *all* the maker's property—though it be inadequate to meet the liability upon the indorsement—it is a waiver of the legal right of the indorser to require proof of demand and notice. Story on Pr. Notes, secs. 281, 282; 2 Greenl. Ev., sec. 190.

But it seems to be equally well settled, that the taking of a security or indemnity by an indorser, *after the note has become due*, under a mistaken impression or belief, that he is legally bound to pay the note, will not bind him, if there has not been a due presentment and notice of the dishonor. And this is upon the principle, that a subsequent promise to pay the note, under a mistaken belief that the indorser's liability had been fixed by the due dishonor of the paper, would not bind him. And no where has this doctrine been more strongly enforced than by this Court. In the case of *Spurlock v. Union Bank*, 4 Hum., 336, it is said, that if the promise, by an indorser, be made under a mistake or misapprehension, either as to the law, or the facts, in respect to his liability, the promise will not

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bind him. 2 Hum., 559. And so, in the case of accepting an indemnity, *after* the maturity of the note, under the mistaken belief that his liability had been properly fixed by the due dishonor of the note. It cannot, in such case, says Mr. Story, justly be inferred that he meant, at all events, to make himself liable for the payment of the note; but he takes the security merely as contingent security, in case of his liability. Story on Pr. Notes, 278, 282; 2 Greenl. on Ev., sec. 190.

Applying these principles to the present case, it is clear that Swan cannot be held liable on the ground of his acceptance of the assignment. It is fully established, that he accepted the security under an impression that his liability as indorser had become fixed by the dishonor of the note. He was misled by the notice of the dishonor of the paper, served on him by the notary on the day the note matured; and acted upon the assumption that the note had been dishonored, and his liability fixed, when the facts were otherwise, and his liability was entirely discharged.

There is great force in the argument that, in general, the indorser's knowledge of the fact of the want of due diligence on the part of the holder, may be reasonably inferred as a fact, from his voluntary subsequent promise to pay, or his taking an assignment for his indemnity. 3 Kent's Com., (Ed. of 1851,) 147-8, top. This would probably be so, in the absence of anything sufficient to repel such inference. But, in the present case, this presumption of knowledge on the part of Swan, is effectually repelled by the official act of the notary, certifying the fact of the due protest of the note for non-payment; which, though not true in fact, Swan was warranted to take as true; and there is nothing whatever in the record to show that he did not act under the belief, in taking the assignment, that the note had been duly dishonored; nor is there anything from which it can be inferred that he intended to assume any liability other than that created by his original contract of indorsement.

According to all the authorities to which we have had ac-

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cess, the acceptance of the assignment, under such circumstances, cannot be held a waiver of demand and notice.

The question as to the right of Hodges, the indorsee, to avail himself of the security thus taken by the indorser for the payment of the note, is not before us.

Judgment reversed. ✓

ALEXANDER McCAMY v. WM. M. LAWSON *et al.*

CERTIORARI AND SUPERSEDEAS. *Constable. Attachment. Effect of service of a writ of supersedeas on an officer. Forma pauperis.* The issuance and service of a writ of *supersedeas* upon an officer having property in his hands under an attachment or *fi fa*, has the effect to release the property, and authorize the officer to return it to the debtor without bond for its forthcoming at the end of the suit. And this is so, although the writ is sued out in *forma pauperis*.

FROM BRADLEY.

Verdict and judgment for the defendants, GAUT, J., presiding. The plaintiff appealed.

TREWHITT, for the plaintiff.

GAUT, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The plaintiffs obtained an original attachment against Thomas Lawson, and placed it in the hands of the defendant, as a constable of Bradley county, who levied it upon a wagon, yoke of oxen, and cow and calf. The same was returned be-

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fore a magistrate, judgment given for the debt, and an order of sale issued. Whereupon, the debtor applied for and obtained writs of *certiorari* and *supersedeas*, to remove the case to the Circuit Court, and stay proceedings on the order of sale. Upon the service of the *supersedeas* upon the constable, he desisted, and also surrendered the property attached to the debtor, without replevy bond, who immediately removed, with his property, from the State, and the debt has been lost. The writs of *certiorari* and *supersedeas* were obtained without any security, under the pauper law.

This suit is brought against the constable and his sureties, upon his official bond, for a breach of duty in delivering over the property attached without replevy bond.

The question, upon this state of facts, is, whether the issuance and service of a writ of *supersedeas* upon an officer, having property in his hands under an attachment, has the effect to release it, and authorize him to return it to the debtor without bond for its forthcoming at the end of the suit.

We are not aware that we have any decision upon this precise point.

It was settled in the case of *Overton v. Perkins, Martin & Yer.*, 373, that the issuance of an injunction where *personal* property has been levied upon, and taken in execution by an officer under a *feri facias*, has the effect to discharge the lien, and authorizes the return of the property to the debtor. Though it is otherwise, where the levy is upon real estate. The Court say in that case, that the common rule is, that an execution is an entire thing, and when commenced, must be ended, and cannot be suspended. But that, by common consent of the Courts, both law and equity, growing out of the necessity of the thing, that rule has been departed from in the case of personalty, on account of its perishable nature. This is not a rule, they say in that case, but an exception to the common law rule, *that an execution is an entire thing, and cannot be suspended*; and the reason given for the exception is, that it is necessary for the interest of both, as the "injunction would destroy both debtor and creditor, if the goods were to await the ter-

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mination of the suit in equity, which might continue many years undetermined." The property being of a perishable character, or expensive to keep, or liable to depreciation, should not be held by the officer to abide the litigation. Such is the reason of the exception stated. Another reason for the return of the property may be, that security for the debt, or to abide the final judgment, or decree, has, or is supposed to have been given, before the issuance of the injunction or *supersedeas*. But where such process is obtained without security, but under the provision in favor of paupers, if, indeed, that can be done, (which we do not now decide,) this last reason would not exist. In determining the liability of the officer, however, no reference can be had to that matter, because he is bound to obey the process, whether properly issued or not, as he is not the judge of that. As to him, and his duties, therefore, the anterior proceeding cannot be looked to. His action under the order of sale is arrested by the writ, and the question simply, is, should he return the property in his hands, by virtue of the original attachment, to the debtor, or retain it. We have seen, that where he holds the property by virtue of a levy under the final process of *feri facias*, he would be bound to return it upon the service of an injunction, and a *supersedeas* is the same thing in this respect. But is the rule the same where the property is held under an attachment, with an order of sale in his hands? It is said, that by the attachment law there is but one mode of regaining possession by the debtor, and that is by replevy, upon security. But the other case is still stronger, as the property in the chattels taken in execution is vested, by law, in the officer, for the satisfaction of the debt, and it can only be divested by bond to deliver for sale. The effect in both cases is the same, the property returns to the debtor, and the power of the officer over it ceases. We can see no ground upon which a distinction can be drawn between the two cases, in regard to the duties and disabilities of an officer. At first view, it would seem that the effect of the *supersedeas* should only be to suspend the sale, but not release the property; and as an

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original question, we might be inclined to so hold, but we consider the contrary to be too well settled to be now disturbed by the Courts. The mischiefs of the rule are palpable enough, and are illustrated in this case; but that does not authorize us to change a settled rule, or limit an established principle. There would be no injury if bond had been given before the *supersedeas* had been allowed to issue, and we do not now say that it was proper to order it without bond and security, but leave that question undecided. But it was ordered and issued by proper authority, the officer was bound to obey it, and all the legal consequences must follow; one of which, as we have seen, was the return of the property to the debtor.

So the law was charged by the Circuit Judge; and the jury found for the defendant, that he was not liable for the loss of the property, as he was guilty of no default in the performance of his duties as an officer.

The judgment must, therefore, be affirmed.

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1. **SCIRE FACIAS.** *Bail. Recognizance, or bond. Immaterial statements rejected.* If unnecessary, immaterial, or irrelevant matter be stated in a bail bond or recognizance, it will not vitiate the same, but be rejected as surplusage. Hence, if a recognizance or bond recite that the defendant is to answer the charge of "*negro stealing, the slave of John G. Gaut in the State of South Carolina,*" such recital is surplusage, and will not render the same void. The bond to appear, must be enforced without regard to what it may show on its face on the question of jurisdiction.
2. **SAME. Same. Same. Construction. Case in judgment.** In the construction of writings, the whole context must be looked to; and words may be rejected, supplied or transposed, to carry out the evident meaning of the parties. The bond was for the appearance of the accused before the Court, "then and there to answer a charge of the

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State, exhibited against him by indictment, for negro stealing, the slave of John G. Gaut, in the State of South Carolina, and *in case of failure*, then this obligation is void, otherwise to be in full force and effect." All the words requisite to make this a valid bond are inserted, but they are improperly located; and the Court will reform the mal-collocation of them so as to give the bond its proper force and effect.

3. SAME. *Plea of surrender of the defendant, by the Governor, upon the requisition of the Executive of another State.* The principle, that the surrender of a defendant, in a criminal case, by the Governor, upon the requisition of the Executive of another State, discharges his bail, settled in the case of *The State v. Allen*, 2 Hum., 258, is referred to and approved.

FROM CAMPBELL.

The *scire facias* was dismissed upon demurrer, TURLEY, J., presiding. The State appealed.

HEAD, Attorney General, for the State.

J. B. HEISKELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Adams was indicted in the Circuit Court of Campbell for stealing and harboring a slave, with a count for securing stolen goods feloniously. He gave bail for his appearance, which was forfeited; and this is a proceeding by *scire facias*, to enforce the penalty against his sureties. Two pleas are relied upon: 1. That there is no such record; and a special plea, that the defendant had been demanded by the Governor of South Carolina, and delivered over by the Executive of this State before the term at which he was bound to appear, and at which the forfeiture was taken, and judgment *nisi* entered.

The Court found the issue on the first plea for the State, and upon that no difficulty arises. But there was a demurrer to the second plea by the State, and the Court holding that

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such demurrer reached the first defect, decided that the bail bond was defective, and dismissed the *scire facias*.

The penalty of the bond is \$1000 against the defendant, and \$500, jointly, against his three sureties. It is in the ordinary form, with this condition, in which the defects in question are supposed to exist.

"The condition of the above obligation is such, that if the said William Adams *alias* Thomas Shwift, shall make his personal appearance before the Judge of this Circuit Court, at a Court to be held for the county of Campbell, at the courthouse in Jacksboro', on the first Monday in May next, there and then to answer a charge of the State, exhibited against him by indictment for negro stealing, the slave of John G. Gaut, *in the State of South Carolina, and in case of failure, then this obligation is void*, otherwise, to be in full force and effect."

The defects insisted upon in argument, and upon which it is said the Circuit Judge based his judgment, are two: 1. That it appears on the face of the bond that the Court had no jurisdiction of the offence, because it was committed "in the State of South Carolina; and 2. That by the wording of the bond, the obligation was to be void in the event the accused *failed to appear*, and *only* to have force and effect in case he did appear."

1. The recital that the slave stolen was the property of Gaut, or the place where he lived, or where the larceny was committed, was entirely unnecessary in the bond. It would have been good without even a specification of the offence charged against the defendant. *State v. Rye & Dunlap*, 9 Yer., 386. Much less was it essential to state where it was committed, or against whose rights. If unnecessary, immaterial, or irrelevant matter be stated, it will be rejected as surplusage, and does not vitiate. *Same case, and authorities there cited*. This is the general rule, with certain exceptions, of which this is not one. The bond to appear, must be enforced without regard to what it may show on its face, on the question of jurisdiction. That is matter of defence for the

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defendant, and cannot be made available collaterally, on a *scire facias* to collect the penalty of the bond. He must appear, and make that defence before the Court in the proper mode. But as a question of construction, we would arrive at the same result. We do not understand the recitation to mean that the crime was committed in South Carolina, but that the owner of the slave stolen resided there. It cannot be supposed that it was intended to state in the bond, the crime was committed out of the State, and beyond the jurisdiction of the Court. That was not a question to be tried, or stated in the bail bond, and we are not compelled, by the language employed, to give it that construction, but can, without violence, give it the more sensible meaning, that the words used referred to the residence, and not the crime.

2. The other objection taken to the bond, is not only technical, but absurd. Its meaning is clear, and all the proper words are there, but the location of them is confused. The substance of the condition is, "that if the said Adams makes his personal appearance, &c., then this obligation to be void," "otherwise," or "*in case of failure*, to be in full force and effect." The only difficulty is, that the words, "and in case of failure," are inserted before the phrase, "then this obligation to be void," when they should have been after. The familiar rule, that in the construction of writings the whole context must be looked to, is sufficient for this case, and leaves no doubt as to the meaning of the obligation.

The case of *Nichol & Ramsey v. White's adm'r*, 4 Haywood, 257, is an authority in point. There it was held, that words might be rejected or supplied, to carry out the *evident* meaning of the parties; for instance, where an injunction bond was conditioned to be void if the injunction was *dissolved*, was made to read and mean, if the injunction be *not* dissolved. Without supplying the word *not*, the bond was insensible and contradictory. In the case before us, no word is to be supplied or rejected, but only a change of the collocation of the words used.

But the *second* plea, if true, was a good defence, according

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to the case of *The State v. Allen*, 2 Hum., 258. This position, though much controverted, and elaborately and learnedly examined at the time by the Court and counsel, is no longer an open question. We have seen that the demurrer was improperly allowed upon the supposed defects in the bail bond, and it cannot be sustained as to the plea. Therefore, we reverse the judgment of the Court below, overrule the demurrer, and remand the case to be tried upon an issue to the said second plea.

THE STATE v. THE MAYOR AND ALDERMEN OF LOUDON.

CRIMINAL LAW. Railroads. Overseers of roads. Signboards. Corporation. Code, § 1186. To prevent railroad accidents, among other things, it is required by § 1186 of the Code, that the overseers of every public road crossed by a railroad, shall place at each crossing a sign marked, "Look out for the cars when you hear the whistle or bell," and the County Court shall appropriate money to defray the expenses of said signs. And when a public county road passes through a town, and is used in common by the public and the inhabitants of the town, both as a public road and a street of the town, the corporation is regarded as the "*overseer*" of such road, within the limits of the town, and, as such, must perform the duties enjoined by law upon the overseers of public roads. The corporation is subject to a criminal prosecution on failure to do so.

FROM ROANE.

The presentment was quashed by Judge BROWN. The State appealed.

HEAD, Attorney General, for the State.

J. B. COOKE, for the defendant.

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McKINNEY, J., delivered the opinion of the Court.

The presentment against the Mayor and Aldermen in this case, was quashed; and the Attorney General, on behalf of the State, appealed in error.

The case is rather a novel one. The substance of the charge is: That a public road, extending from Kingston, runs through the town of Loudon; and that at a point of said road, within the corporate limits of the town, the East Tennessee and Georgia Railroad crosses the same. And the ground of the prosecution is, the failure of the mayor and aldermen to put up a "sign," as prescribed by sec. 1166 of the Code.

For the prevention of railroad accidents, certain precautions are required by the section referred to. Among others, is the following: "The *overseers* of every public road, crossed by a railroad, shall place at each crossing a sign, marked—*Look out for the cars when you hear the whistle or bell*; and the County Court shall appropriate money to defray the expenses of said signs."

It is argued that this provision applies only to the public roads lying without the limits of the towns; to such roads as are properly under the control and regulation of the County Court. And such would seem to be the letter of the law. But it is a familiar rule in the exposition of statutes, that the reason and intention of the law, when obvious, will always prevail over the literal sense of the words. If this precaution be essential to the protection of the public—and the Legislature has so regarded it—is its observance less important as respects a public road within the limits of a town, than to a road lying without? If not, upon whom shall the duty be devolved, in a case like the present? Shall the beneficent object of the law be defeated, by a rigid adherence to the letter, in total disregard of the spirit and intention?

It is clear, that it is neither the duty, nor the right of the County Court, or its overseer, to go within the corporate limits of a town to erect the *signboard* required by the

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statute. In doing so, the overseer would be a trespasser. It is well settled, that the corporation of a town is bound to keep the streets in repair; and that the obligation to do so, is not created by the act of incorporation, but exists at common law. *State v. Mayor and Aldermen of Murfreesboro'*, 11 Hum., 217. And where a public county road passes through a town, and is used in common by the public, and the inhabitants of the town, both as a public road and a street of the town, the corporation must be regarded as the "overseer" of such road, so far as the same lies within its limits; and as such, must perform the duties enjoined by law upon the overseers of public roads. If this view be correct, it follows, that the Court erred in quashing the presentment.

Judgment reversed.

D. P. HURLEY *et al.* v. S. L. COLEMAN *et al.*

LIEB. *Vendor's.* In an application to enforce, not necessary to show title.

Upon an application to a Court of Equity, by a vendor, to enforce his *lien* for the purchase money, it is not incumbent upon him to file the evidences of his title. The vendee cannot resist the application, for an insufficient title in the vendor. But the vendor would not be entitled to receive any portion of the purchase money remaining after selling the lot, in the absence of a good and indefeasible title.

FROM KNOX.

Decree for the complainants, Chancellor LUCKY presiding.
The defendants appealed.

J. R. COCKE, for the complainants.

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RAMSEY, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed to enforce the vendor's lien for the balance of the purchase money on a lot in Knoxville. The sale was for \$2050, of which there is yet due, about \$1400, the balance having been paid. The bill is resisted upon the allegation that complainants cannot make a good title.

That is not a good defence to a bill for the sale of the lot, but it would be to the payment of any portion of the purchase money, which might remain after selling the lot, and applying the proceeds. It would also be a good ground, if made out, upon which to recover back the amount of the consideration which had been paid by the defendants. But these questions do not now properly come up for adjudication. The only point now, is, whether it is necessary for the plaintiff to file a good title to the lots, and the Court should pass upon it before the prayer of the bill, simply to sell and appropriate the proceeds of the property to the payment of the debt agreed to be paid for it. All that is demanded by the complainants, is, that the lot with such title as they have, be sold to pay the debt. As between the parties themselves, there can be no legal objection to this. It will not affect the title of any body else, and so long as the vendor asks nothing more than the application of the lot sold to his debt, there can be no injury to the vendees, and it is not material to them whether the title is good or not.

No question can be made by them as to the title in resistance of the application, simply to sell the property. If any grounds exist for a controversy on that subject, they must be presented by a cross-bill, or in some other mode, by the vendees.

The complainant files his title, but there was no reference made upon it, nor does the Court consider of it in the decree for a sale of the lot.

The decree will be affirmed and remanded for execution, but

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it will be confined to the sale of the lot, without a decree against the defendants for any balance of the debt, which may remain after the application of the proceeds of the sale; as to that, there will be no adjudication.

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1. **CRIMINAL LAW.** *Mayhem. Assault and battery.* When defendant may be found guilty of a less offense. Code, § 5223. By § 5223 of the Code, any person indicted for an assault with intent to kill, or to commit any other felony, may be found guilty of an assault, or an assault and battery: or a defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged, whether it be a felony or misdemeanor. Hence, on an indictment for *mayhem*, the defendant may be found guilty of an assault and battery.
2. **SAME.** *Limitation of prosecution.* Code, § 4988. If the indictment or presentment be for a felony, the limitation as to felonies applies; and not the limitation as to misdemeanors, although the defendant may be found guilty of a misdemeanor.

FROM MONROE.

The defendant was convicted before BROWN, J., and appealed.

J. B. COOKE, for the plaintiff in error.

HEAD, Attorney General, for the State.

McKINNEY, J., delivered the opinion of the Court.

The indictment is founded upon sec. 4606, of the Code. It charges that the defendant, on the 6th day of June, 1857,

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"did bite off a piece of the left ear of one James Everhart," &c. This offence is made a *felony*, punishable by imprisonment in the penitentiary not less than two, nor more than ten years.

The jury found the defendant not guilty of the felony charged in the indictment, but guilty of an assault and battery; and, by their verdict, assessed a fine of ninety-five dollars for his offence.

Upon this verdict, the Court rendered judgment, from which the defendant appealed.

The errors assigned upon this record, are not well founded:

1st. It is expressly provided by sec. 5223 of the Code, that, "Any person indicted for an assault with intent to kill, or to commit any other felony, may be found guilty of an assault, or assault and battery, as the case may be." And by the last clause of the preceding section, it is declared that, "the defendant may also be found guilty of any offence, the commission of which is necessarily included in that with which he is charged, whether it be a felony or misdemeanor." Under either of the foregoing provisions, the verdict is well sustained.

2d. The prosecution was not commenced until more than twelve months after the commission of the offence; and it is assumed that the defendant could not, therefore, be convicted of the lesser offence; the limitation of prosecutions for misdemeanors being twelve months, by sec. 4983. This is an erroneous assumption. The prosecution being for a felony, and not for a misdemeanor, the limitation prescribed in felonies of the grade charged in the indictment, applies to the case, and not the limitation for the misdemeanor, of which the defendant was found guilty, as being included in the felony. And in cases of this grade, the limitation is five years, by sec. 4986.

The propriety of the assessment of the fine by the jury, is not questioned.

Judgment affirmed.

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POLLY LOWRY, BY, &C., v. C. M. MCGEE *et al.*

1. **TRUST AND TRUSTEE.** *Liability of trustee for negligence. Will. Statute of limitations. Interest.* The will of the testator contained the following clause: "The debt due me from William Lowry and my son, Alexander, and for which I have their note, I hereby assign and transfer to my son, John McGee, to be held by him *in trust*, to permit the said William Lowry and Alexander McGee to use and employ said sum of money in whatever manner may be profitable to them, the said William and Alexander. But in case any accident or calamity is likely to befall them, then it is my will and desire that my son John, as trustee for that purpose, should receive said sum of money, and apply it in such manner as in his judgment should be most useful and beneficial to Polly Lowry, wife of said William, and her children, and to said Alexander and his children." John McGee qualified as executor. *Held:*

1. By qualifying as executor, John McGee assumed the trust imposed upon him by the will, and he was bound to act faithfully and with vigilance for the interest of the beneficiaries.

2. Upon the happening of the contingency contemplated by the will, it was the duty of the trustee to use all proper and necessary means to secure and collect the fund, to be held and used by him for the purposes and trusts specified; and upon failure to do so, he was personally liable for the fund, with interest thereon.

3. Until the happening of the contingency provided for, Lowry and Alexander McGee had the right to use and employ the fund as they deemed proper, and the same could not, until then, have been collected by the trustee. And until he had a right to collect the fund, he is not chargeable with interest.

4. Lowry failed in 1848, and no effort was made by the trustee to collect or secure the note, although the trustee was apprized of his failing condition; and the complainant is entitled to recover the one-half of the note, \$5,000, with interest from that date.

5. Even if the debt had been barred by the statute of limitations, the trustee is not relieved from liability, thereby, because no steps had been taken by him, by renewals, or otherwise, to guard against that defence; and because the debtor might not have seen fit to rely upon the statute, even if, by law, he could have done so.

2. **SAME.** *When implied.* If a son, under the injunction of his father to purchase a farm for his sister, buys a tract of land and places her

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upon it, taking the legal title to himself, there being no consideration passing from or for her to the son—it constitutes a voluntary unexecuted trust, binding only in *foro conscientie* of the son and his heirs, and cannot be enforced in favor of the sister.

FROM M'MINN.

This cause was heard before Chancellor VAN DYKE. The facts are stated in the opinion of the Court.

COOKE and JARNAGIN, for the complainant.

ROWLES and LYON, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This case is important in its principles as well as the amount involved. It is a claim against the defendants, as the heirs and representatives of John McGee, now deceased, for a large amount, on account of a failure on his part to perform certain trusts for the benefit of complainant.

The facts of the case, so far as they are necessary for the questions raised, are briefly these :

The complainant is a daughter of Barclay McGee, who made his will in July, 1819, and soon after died, leaving a large estate. He left a large portion of his estate to his son John, and made him one of his executors. William Lowry, the husband of his daughter Polly, was not in favor with him, and did not enjoy his confidence. He gave to this daughter five slaves, and a house and lot he had previously placed in her possession, and no more of his estate, except the contingent provision in the following clause: "The debt due me from Wm. Lowry and my son Alexander, and for which I have their note, I hereby *assign and transfer* to my son John McGee, to be held by him *in trust*, to permit the said Wm. Lowry and Alexander McGhee to *use and employ* said sum of money in whatever manner may be profitable to them, the

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said William and Alexander. But in case any accident or calamity is likely to befall them, then it is my will and desire that my son John, as trustee for that purpose, should receive said sum of money, and apply it in such manner as in his judgment should be most useful and beneficial to Polly Lowry, wife of said William, and her children, and to said Alexander and his children."

Upon this trust the first and principal question arises. The debt and note referred to was \$10,000, the one-half of which, with the interest from 1819, under the events which have happened, is claimed by the complainant for a breach of trust on the part of the trustee, by which it has been lost.

The Chancellor granted the prayer of the bill, and gave her a decree for \$16,900, consisting of the \$5,000 and the interest from the date of the will, or death of the testator, in the year 1819.

William Lowry continued solvent and apparently prosperous until 1842 or '43, when he became embarrassed and failed. He had a considerable property, upon which he made deeds of trust to secure a part of his creditors; but others remained unsatisfied. He had much more means than would have been sufficient to satisfy the debt in the hands of John McGee, the trustee under the will, if it had been so applied. McGee became apprised of the approaching storm, and succeeded in procuring from Lowry a conveyance of valuable lands, the legal title to which was in him, but the right in McGee. But no efforts whatever were made, not even an application or request to secure the debt of \$5,000, for the benefit of complainant and her children, as directed by the will in the event which had then happened. It is reasonable to suppose that it would have been an easy matter to have induced Lowry to have made this debt secure for the benefit of his wife and children, out of the ample means then in his hands, in preference to all other creditors, if he had been requested to do so. By qualifying as executor, McGee assumed the trust imposed upon him by the will in this regard. He thereby became bound to act faithfully and vigorously for the interest of the

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beneficiaries. It was incumbent upon him to adopt every means in his power to secure the debt. The "accident or calamity" provided for in the will had befallen the debtor, and the time to act in the collection of the debt had arrived. It does not appear how long the failing condition of the debtor had been known to the trustee, but it does appear that he was aware of the impending disaster, and profited by his knowledge so far as to secure himself. No good reason is given, or can be seen in the record, why he did not, at the same time, make safe or collect the trust fund. Nor can it be reasonably doubted but that he could have done so, if he had tried. It must then be very clear, upon the plainest principles regulating the duties and responsibilities of trustees, that he has rendered himself accountable for the fund. It is not a good answer to this, that the debt was barred by the statute of limitations or lapse of time, as is contended by counsel. If that defence could have been made available by Lowry, which is not conceded under the circumstances, so as to have defeated any action that might have been brought against him for the debt, it cannot still be available in this controversy for two reasons: *first*, because no step had been taken by the trustee, in the way of renewals or otherwise, to guard against that defence; and *secondly*, and mainly, because the debtor might not have seen fit to rely upon the statute even if, by law, he could have done so. We are not to presume that Lowry would have interposed this or any other defence, if, indeed, he could have done so, to a just claim in favor of his own wife and children, who were threatened with want and poverty without it. At all events, and in every view of the subject, it was the imperative duty of the trustee to make every exertion in his power to secure the debt. But, from what we can see, he did nothing—made no effort to secure it; not even a request to the debtor to pay it by transfer of, or deed of trust upon his ample property. Surely then, upon every principle, he must be held accountable for the fund in a Court of Equity.

But an important question next arises, as to the time from

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which the interest should be counted. Upon this we have no difficulty. By the will it was a term in the trust that the debtor should have the use and benefit of the money due, to employ, at discretion, for his own benefit, until the contingent event specified should occur for its collection. Until that time the payment could not have been coerced; it was not due and collectable by the assignee in trust. It never could have been, successfully, demanded if Lowry had not failed. The reason operating upon the mind of the testator would never have existed if Lowry had continued solvent. The necessity for calling in the money could only arise by that change in Lowry's circumstances, which seems to have been anticipated as likely to occur, by which his wife and children would be deprived of the means of a comfortable support. When, if ever, that state of things should come up, or appear likely to arise, the duty to act was enjoined by the will upon the trustee, and not before. There is no intention, nor could it be so from the nature of the transaction, that the fund should accumulate by the accrual of interest. The interest should only be counted against the trustee from the time Lowry failed and the trustee was in default—say from the first of January, 1853. The decree, in that respect, must be modified.

2. There is another branch of this case not yet noticed. The complainant claims the valuable tract of land on which she and her family reside, and have used and occupied perhaps from the year 1820 up to this time. She insists that her brother, John McGee, undertook and promised their father that he would, out of his large and ample means, procure a home for complainant and her children; and, in pursuance of that undertaking, he purchased at the land sales in 1820 the said tract of land, for her use and benefit, but kept the legal title in himself, for greater security against events that might occur, but always acknowledged the trust in her favor: and she further charges, that the money used for this purpose was placed in his hands by their father before his death, and that the land was bought and paid for out of that fund. This last position of the bill is not made out by the proof, but the pre-

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ponderance of evidence is that said John paid for the land out of his own means. But it is clearly made out, by the most respectable and reliable witnesses, that the said John admitted and acted upon the injunctions of his father in procuring this land for the benefit of his sister and her children, in fee, but retained the title in himself for greater security against the creditors or improvidence of Lowry. And there is reason to believe that it was his intention, until his death, to so fix the title, but, by neglect, failed to attend to it. We concur with the strong expressions of the Chancellor, in his decree, that there is a high moral obligation resting upon the defendants, who inherited the very large estate of their father, to carry out his wishes and instructions in this respect, by doing what he so often declared he intended for the benefit of his sister and her children. But we are reluctantly constrained to decide that they cannot be compelled by law to do so. There was no written declaration of the trust, nor was there any consideration passing from or for them to the said John upon which a trust can be raised and enforced by a Court of Equity. It was a voluntary, unexecuted trust, binding only upon the conscience of John McGee and his heirs; but they have a legal right to stand upon the strict law, and successfully resist the claim.

It appears in the proof that the said John, both in his professions and acts, was kind and liberal to his sister and her family at all times. He rendered them great assistance and many favors in their misfortunes. And there is just as little doubt that it was his purpose, long entertained and constantly announced, to secure to them the tract of land in question, and that he bought it in 1820 for that and no other purpose. As a conclusive evidence of that, he bought it through the agency and in the name of Lowry, and permitted the title to a portion, if not all of it, to remain in him as long as it was safe to the family, or until his failure. We are however compelled, by fixed legal principles, to refuse the prayer of the bill as to the land, and allow the defendants, if they choose to do so, to defeat the cherished purposes of both the father

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and grandfather in regard to the home of the complainant and her children.

The conclusion is, that we affirm the decree of the Chancellor in all things except as to the interest on the \$5000, from 1819 to 1843. The whole costs of the case, here and below, will be paid by the defendants, Wm. Lowry and the McGees, equally.

ISAAC, (A MAN OF COLOR,) BY NEXT FRIEND v. HENRY FARNSWORTH *et al.*

1. **FREEDOM. Contract. Parol trust.** An agreement between the master and slave, by which the master, for a valuable consideration, conveys the slave by bill of sale to a third person, with the verbal agreement between the slave and such third party, that the slave is to serve him, in consideration of the amount advanced to his master, for a specified time, and then be entitled to his freedom, creates a trust in favor of such slave, which a Court of Chancery will enforce. Nor can the person who thus holds the legal title dispose of such slave to a person cognizant of the facts, so as to defeat his right to freedom.
2. **SAME. Will. Construction. Power to sell.** A general and unqualified power to dispose of property bequeathed by will, vests the absolute title to such property in the legatee, although it may be given for life, with remainder over to others. And such legatee would be authorized to dispose of the property thus bequeathed, by gift, sale, or otherwise. The tenant for life would not be a trustee for the remaindermen, and required to hold the proceeds in case of sale in trust for them. Hence, the tenant for life could confer upon a slave thus given, the right to freedom.
3. **SAME. Same. Same. Illustration.** D. made his will, in which he bequeathed his property to his wife for life, with remainder to his children, equally. He vested in her the power to hire or sell the negroes, and to remove them to any other county or State. By agreement with the slave, the widow sold him to S. for three hundred dollars, with the verbal understanding between the widow, slave, and S,

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that the slave was to serve S. for eight years, and then to be emancipated. Held, that a *parol trust* was created in favor of the slave, and he was entitled to his freedom

FROM GREENE.

A decree was pronounced in the Court below, Chancellor LUCKY presiding, in favor of the complainant. The defendants appealed. The facts are stated by the Court.

T. D. & R. ARNOLD and CRAWFORD, for the complainant.

DEADERICK and MCFARLAND, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This is a bill for freedom. The facts, as we consider them established in the case, are as follows :

In 1829, Frederick Dewitt, the owner of Isaac, made his will, and died. He left his two slaves, Isaac being one, to his wife for life, with remainder to his children equally, and then makes this singular provision : " My will is, that no Court nor power of law, either of county or State, shall have anything to do with my estate, but that at *any* time my wife shall have full power to rent out or sell my tract of land, *hire or sell* my two negro boys, or remove any part or all that is movable, to any other county or State as may seem good unto her."

The widow, after some years, broke up house-keeping, and lived with her son-in-law, Wm. Gilbert. Having enjoyed the services of the two slaves, and in the meantime sold the other, she proposed to Isaac that if he would procure any one to advance three hundred dollars in gold or silver to her, she would give him his freedom, and gave him, or caused the same to be done by her said son-in-law, Mr. Gilbert, who acted as her agent, a written authority to make the best arrangement he could for the money. He succeeded in making a contract with Michael George, of Greene county, to advance the

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amount required, for eight years' services. Whereupon she executed an absolute bill of sale to George, with an understanding or verbal agreement on his part, that he would, at the end of the term, emancipate Isaac. This was in August, 1846. Isaac went into the service of George, under this contract, and served him faithfully, with the settled and avowed purpose on the part of George, all the time, to give him his freedom at the end of the term. About fifteen months before the termination of the eight years, under some influence or other, the old lady, then being near eighty, at the instance of one Henry A. Farnsworth, one of the defendants, sold Isaac to McCampbell, another defendant, and made him an absolute bill of sale, to take effect in possession at the termination of the eight years. Upon application to George to acknowledge this title, he refused, and insisted upon his title by said bill of sale, coupled with the trust for the benefit of the slave. A bill was then filed in the name of the old lady, to reform the bill of sale of George, so as to make it a contract for eight years' service only, which suit was compromised by the surrender, by George, both of his title and the slave, upon the payment to him, by McCampbell, of one hundred dollars for the balance of the term—he not choosing to enter into litigation about the matter, as to which he had no pecuniary interest. This bill was then filed by Isaac to enforce his contract for emancipation. There is a great amount of swearing and false swearing, crediting and discrediting of parties and witnesses in the case; but we conclude, upon a full consideration of the evidence, that the facts are substantially as above stated. Perhaps in no case was the proof ever more irreconcilably conflicting. But it would be as useless as disagreeable to comment upon the picture of depravity and the perversion of truth among near relations and speculators which the record in this case exhibits. It is revolting to see to what an extent some men will go against the rights of the weak, in the eager pursuit of gain. We prefer not to develop the deformity of this case by an analysis of the proof, but simply to state our conclusions as to the facts, which we regard as estab-

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lished by the weight of the evidence in the record, and upon which our judgment as to the law must be based.

Such being the facts of the case then, what is the law upon it? The Chancellor considered Isaac was entitled to his freedom, and so decreed.

1. It is objected that Mrs. Dewitt had only a life estate in the slave under the will of her husband, and could not dispose of him so as to affect the remainder in her children.

True, a life estate only is expressly given to her with remainder over; but she is vested with a general, unqualified power to "sell." This, by all the authorities, makes her estate absolute. She was executrix as well as legatee, and it is attempted to draw a distinction between this and common cases falling under the principle stated, upon the ground that she was trustee for the remaindermen, and if she could sell, she could not give, by emancipation or otherwise, but could only sell, and then would be compelled to hold the proceeds as she held the slave, subject to the remaindermen's rights. We are not sure that we have correctly understood or stated the argument upon this point. But in no form can we assent to its soundness. The power to sell is without qualification; and if the rule of law be correct, and it cannot be questioned, that the power to sell makes the title absolute in the tenant for life, whether it is exercised or not, then there is no limitation of the right to dispose of the property, and it may be as well by gift as by sale. But whether she chooses to take the price partly in money and partly in benefits to the slave can make no difference. She could sell for half the value as well as for the whole, and surely could pass the title subject to a trust in favor of the slave as well as any other person. The defendants have recognized her power to sell by purchasing from her themselves; and to succeed upon this ground would be of no benefit to them, because it would annul their title as well as the other. But, as we have seen, she had a perfect right to sell and convey a good title. The bill of sale then to George carried a good and perfect title, if it is not subject to impeachment upon other grounds. It is insisted that it

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was only a contract for eight years' service, and then the title was to revert. To prove this, an endorsement on the back of the paper, by which she binds herself for the eight years' work for the three hundred dollars, is referred to and relied upon. We think it sufficiently appears that the object of this was not to change the contents of the paper, which was well understood by her to convey the whole interest to enable George to carry out her wishes in conferring freedom, but to bind herself that he should live and serve the eight years. Isaac had served her faithfully for nearly a score of years, and she wished to extend the boon of freedom to him, but not without a further consideration of three hundred dollars. The effect of this arrangement was, that instead of consummating his liberation herself, she gave her consent to it for a satisfactory consideration, and passed the title out of herself to another with this parol trust attached. It is true that no consideration passed from the slave, as she was entitled to his time and labor not only for the eight ensuing years, but as long as he might live; and perhaps such a promise or contract could not have been enforced by the slave against her. But then she executed the purpose so far as it could be done by her, it being prospective, by parting with the title, and, in effect, conferring the right to freedom, incumbered with the eight years' service. She had no other act to perform in the case, and could not revoke what she had done. Neither could George, by any compromise to which the complainant was not a party, surrender the trust he had taken upon himself to the prejudice of Isaac's rights. He was allowed by his mistress to become a party to this contract and arrangement for his benefit, and is entitled to the advantages of it, subject alone to the legal condition, that the judicial authorities acting for the State shall sanction it. This the proper tribunal has done, subject to the revision of this Court. Isaac has established an excellent character for a slave, and proved that he is worthy of freedom, so far as that is concerned. We see no reason for withholding our assent upon this ground. Indeed, the provision of our recent statutes, that emancipation can

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only be allowed upon condition that the subject shall be sent out of the State to Liberia, in Africa, abrogates this provision of the law as it formerly existed in these cases, as it does away the reason for it.

Upon the whole, we are of the opinion that complainant has made out his right to freedom, and affirm the decree of the Chancellor to that effect. The case will be remanded for the execution of the decree according to the provisions of the statutes on that subject. But in taking the account for hire, and adjusting the rights of the parties, the defendant, McCampbell, will be allowed a credit for the unexpired term of about fifteen months, for which he satisfied George on obtaining the possession. This modification will be made in the decree, and in all other respects it is affirmed.

BROWN AND SMITH v. JAMES MCCLLOUD.

1. **MESNE PROFITS.** *Right of executor to sue for. Will.* An executor cannot maintain an action for *mesne profits*, although he may, by the will, be clothed with power to sell the land and divide the proceeds among the legatees.
2. **SAME.** *Same. Same. Possession.* Rents and profits are incident to the ownership of the land, and the remedy for *mesne profits* belongs exclusively to the person having title to the land. An actual possession of the land is not sufficient of itself, without title, to authorize a party to sue for *mesne profits*.

FROM KNOX.

This cause was heard before Judge BROWN. Verdict and judgment for the defendant. The plaintiffs appealed.

MAYNARD & WASHBURN, and LYON, for the plaintiffs.

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J. R. COCKE, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of trespass for *mesne profits*. The plaintiffs failed in a recovery, and brought the case here by an appeal in error. The facts of the case are as follows:

Robert Smith, by his last will and testament, after certain specific devises of land, made this general devise: "I will that all my other lands and property that is found after my death, be sold to the best advantage; and the money to be equally divided" among certain children and grandchildren therein named. The plaintiffs were nominated as executors, and qualified as such.

In pursuance of the power contained in the will, the executors, on the 21st of November, 1851, sold a tract of land to the defendant; but the terms of the contract, not being agreed on, were not reduced to writing, and the executors refused to complete the contract. The defendant, however, intruded himself into possession of the land, against the will of the executors; and the latter brought an action of forcible entry and detainer to regain the possession. The defendant filed a bill to enforce a specific execution of the contract of sale, and to enjoin said action. This bill was dismissed on the final hearing of the cause in October, 1855, and by a writ of possession awarded by the Court, the plaintiffs were restored to the possession of said land. And, thereupon, they commenced this action.

The Circuit Judge instructed the jury, that the plaintiffs could not maintain the action, for the reason that they were vested with no interest in the land, by the terms of the will; but only with a naked power to sell.

The argument for the plaintiffs is, in substance, this: That conceding the executors had no interest in the land, yet, for the purpose of executing the power to sell, they were entitled to possession of the land; and were, in fact, in the actual possession thereof at the time of the contract with defendant;

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and that inasmuch as the defendant professed to have entered into possession of the land, and to have taken the rents and profits, under, and in virtue of his contract of purchase from the plaintiffs, he was placed in such a relation to them, as precluded him from objecting to their want of title. This conclusion is not tenable. If it were to be admitted, that the executors, as such, were entitled to the possession of the land, in order to complete execution of the power of sale, by a delivery of possession to the purchaser, it would by no means follow that the defendant would be estopped to gainsay their title. What might have been the relation of the defendant, if he had been let into possession by the act of the plaintiffs, under the parol contract of sale, we need not now inquire. It is sufficient for the determination of this point, that the defendant entered upon the land, and appropriated the profits, avowedly as a wrong-doer, against the will, and in defiance of the plaintiffs. The implication of a tenancy, or of any promise, on the part of the defendant, is, therefore, positively excluded, and he is fully at liberty to deny the title of the plaintiffs.

But, another ground of recovery was assumed in the argument. It is said, that, admitting the devise in the will to confer on the executors a mere power, without any interest in the land, still, the plaintiffs, in their individual capacity, if not in their character of executors, may maintain this action, upon the fact of their *actual possession* of the land at the time of defendant's wrongful entry, without showing any title, or interest, in the soil.

This position, we think, is also untenable. It is certainly true, that an action of trespass *quare clausum fregit* may be maintained upon an actual possession, against a mere wrong-doer, or one who cannot show a better title in himself. 3 Starkie's Ev., 1435. But this principle does not apply to the action of trespass for *mesne profits*, which results as a consequence of the recovery in ejectment, and as a supplemental remedy to that action. Rents and profits are incidents to the ownership of the land; and, consequently, this

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remedy belongs exclusively to the person having title to the land. 2 Saund. on Pl. & Ev., 207; 2 Greenl. Ev., sec. 838.

In the present case, the rights to maintain the action of trespass for *mesne* profits—if it exist in favor of any one—is in the heirs at law of the testator. The land not being specifically disposed of by the will, the legal title descended to the heirs, subject to be divested upon the execution of the power of sale by the executors.

Judgment affirmed.

J. W. PRICE v. J. D. THOMAS AND J. D. THOMAS v. J. W. PRICE.

1. **CONTRACT.** *Construction. Sale of land. Rents. Interest. Consideration.* Price sold Thomas the one-half of a tract of land for three thousand dollars. After the description of the land, the article of agreement continues thus: "furthermore, I, J. W. Price, propose to give my daughter, Julia A., said Thomas' wife, the other half of said land; which, if I fail to do, I hereby bind myself and my heirs to refund the money to said Thomas which he may pay for said land, together with its interest." Price bound himself to deliver the possession to Thomas, and, until he done so, to allow him the rent of half the whole tract, together with interest on all the money he might pay toward the land. Held:

1. The stipulation in favor of the wife of Thomas was no part of the consideration for the \$3,000, agreed to be paid upon the contingency stated. The moiety purchased by Thomas was the *sole* consideration.

2. The stipulation to give the other half of the tract of land to Mrs. Thomas, and, in case of failure, to refund to her husband three thousand dollars, was a naked, voluntary undertaking—a *nudum pactum*—and cannot be enforced in favor of Thomas.

3. If binding, Price would have the right to carry out the agreement at any time during his life, no time being fixed for its performance; or it might be done in his will.

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4. Although it would seem inequitable that Thomas should get the rents until placed in possession, and at the same time interest on what he had paid—such is the agreement of the parties, and will be enforced.

FROM CLAIBORNE.

This cause was heard upon bill and cross-bill before Chancellor LUCKY, who pronounced a decree for the complainant in the original bill. Thomas appealed.

MAYNARD & WASHBURN, and TRIGG, for Price.

NETHERLAND & HEISKELL, and EVANS, for Thomas.

CARUTHERS, J., delivered the opinion of the Court.

Price, a citizen of Virginia, on the 10th of June, 1853, sold to the defendant, his son-in-law, the one-half of his "Elk-garden" tract of land, and executed the following article :

"Know all men by these presents, that I, John W. Price, of Washington county, Va., hereby obligate myself to make unto James D. Thomas, of Claiborne county, Tenn., a legal general warranty title to one-half of my Elk-garden tract of land, in Russell county, Virginia." After the description by metes and bounds, the article continues thus: "*furthermore, I, J. W. Price, propose to give my daughter Julia A, said Thomas' wife, the other half of said land; which, if I fail to do, I hereby bind myself and my heirs to refund the money to said Thomas which he may pay for said land, together with its interest.* This obligation is in consideration of \$3,000, to be paid me by said Thomas. I furthermore bind myself, to remove the present incumbent, M. Askew, and give Thomas possession; and until this be done, to allow to said Thomas the enjoyment of the rent of half the said Elk-garden lands, together with interest on all the money which he may pay toward said land."

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This is signed under seal by Price.

October 27, of the same year, 1853, J. W. Price, jointly, with his wife, Mary Price, made a general warranty deed to Thomas, of an undivided moiety of said land.

June 27, 1854, Askew still remaining in possession, and three years of his lease from Price unexpired, an article of agreement was entered into between him and Thomas, prescribing the manner in which the land should be used and cultivated, protecting the timber, &c., and concluding with this clause, "though the said Askew had agreed with J. W. Price to give up the farm when it was deeded to the said Thomas; yet the said Thomas, on his part, to secure to Askew the benefit of the farm for the before mentioned three years, with the restrictions before named." In a previous part of the article, Askew bound himself to "fulfil the conditions of the articles between himself and Price, for the remaining three years."

After this, August 22, 1855, it would seem that there was a settlement between Price and Thomas, by which it appeared that there was still due of the consideration for the land, a balance of \$1084.90, for which a new note was executed by Thomas, in which there is this clause, "This bond is to bear interest from the time that full possession of said land is given to me." On the same paper, and preceding the note, it is written and signed by Price, that "Price is to pay interest on \$1915.10 until the next payment is made, and so on, from the date of the following note on Thomas." And on the back of the note is a credit of \$47.98, Feb. 18, 1856.

Upon this note an action was instituted in the Circuit Court of Claiborne county, pending which, this attachment bill was filed against Thomas and Gibson, charging that Thomas had sold his interest in the land to Gibson, and had his notes, and was not able to pay him without that fund, and he prayed and obtained an attachment of the notes upon Gibson.

Thomas then filed a cross-attachment bill, upon the ground that Price was his debtor \$3000, the amount of the consideration of the land, upon his failure to perform the covenant, to refund him the said amount, in case he failed to convey to

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Mrs. Thomas the other half of the Elk-garden tract, and that he had not only failed to perform his covenant in this respect, but had placed it out of his power to do so, by conveying it to another.

The first and main question debated upon this state of facts, arises upon the cross-bill, as to the obligation upon Price to pay the \$3000, as liquidated damages, or the penalty for failure to convey the other moiety of the Elk-garden land to the wife of Thomas. The position of the bill, or that assumed in argument, is, that Price has become the debtor of Thomas, to the amount of \$3,000, of which the note sued upon is a part, and as he is a non-resident, it is a proper case for attachment of the note sued upon. It is not a bill for specific performance of the covenant in favor of his wife. If that were the object, that immense volume of evidence in relation to the separation of Thomas and his wife, and the causes of it, would have some application to the case, and be proper for consideration, because it might operate upon the discretion of the Court, to which bills for specific performance are addressed. But as the cross-bill is based upon the assumption that the relation of debtor and creditor between Thomas and Price, has resulted from the failure on the part of the latter to perform his contract in that respect, that proof is all entirely irrelevant.

In no point of view can the cross-bill be maintained for the recovery of the \$3000. We do not understand, from the whole instrument, that this stipulation in favor of Mrs. Thomas, who was the daughter of Price, was any part of the consideration for the \$3000 agreed to be paid upon the contingency stated, but that the moiety of the land was the sole consideration. We think that construction of the contract is unauthorized by the instrument. It is plausible, but not sound. The bill gives the transaction that complexion, but it is denied in the answer, and we are left to settle it as a question of construction. The land was a full consideration for the amount to be paid. A few months after the contract, it will be seen that a deed in fee, with warranty, was made to Thomas. What consideration then, was there for the obligation to re-

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fund to Thomas the \$3000, which he now claims as a debt? Price insists in the writing, that it is his "*purpose*" to give the other half of the land to his daughter, and in case he fails to execute that purpose, he will pay her husband the amount specified. This must be regarded as a naked, voluntary undertaking, and will not be enforced in favor of Thomas.

But if it be regarded as binding, the time has not arrived for its enforcement. There is no time specified for the gift to his daughter to be perfected, and, consequently, he would have his whole lifetime in which to carry it out. It may be done in his will, and so the deed *received* by Thomas for the moiety bought by him, provides. This must then be taken as the understanding of the parties as to the time. In no view, therefore, can Thomas be regarded as a creditor, or Price a debtor, in that respect. The cross-bill was properly dismissed as to that aspect.

But it was properly entertained for an account between the parties, to ascertain how much, if any thing, remained due upon the note sued upon.

There is no error in the decree, settling the basis of the account. Price is made to account for one-half of the rents received by him, and also the interest upon the amount he had received of the consideration. It would seem inequitable, that Thomas should get the rents in place of the use of the place, and at the same time interest on what he had paid for it; and so it would be regarded, if it were not for his positive contract. It was competent for him to make his contract in that way, and he must abide by it. He expressly bound himself in the original contract, to give the possession to Thomas, and until that was done, to allow him the "enjoyment of the rent of half" the place, "together with interest on all the money which he may pay toward said land." And in pursuance of this stipulation, at the last settlement, August 22, 1855, it appeared that Thomas had paid \$1915.10, and still owed \$1084.90, for which a note of that date was given. Price then agreed, in writing, that he was to pay interest on

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the amount which had been paid, and was to have no interest on the note until full possession was given of the land.

It is too clear for controversy, that Askew, the tenant of Price at the time, and long before the sale, continued in possession, and settled with Price for the rents; and that Thomas has never yet been put into possession of the land. This is all proved by Askew, the tenant. It is true, he acknowledged the title of Thomas, and entered into some contract with him in relation to the land, as before stated, but he never paid him any rent, but always paid the whole to Price, or gave his notes for it. It was right then, to make Price account, upon his contract, for one-half of the rent, and also for the interest on the amount of the consideration which had been paid to him, that is, upon the sum of \$1915.10, from August 22, 1855, and also upon the \$47.98, from February 13, 1856. This sum, together with the one-half the rents received by Price, (with interest from the end of each year upon the rents,) and the credit of \$47.98, will be deducted from the amount of the note in suit, without interest, and that will show the true state of accounts between the parties.

The decree will be affirmed, with the slight modifications indicated above.

WILLIAM G. SWAN v. O. P. NEWMAN *et al.*

1. CHANCERY PLEADING. *Parties. Feme covert.* It is not essential to the validity either of a bill or petition that the complainants should sign them. It is sufficient if their names appear in the body or caption of them. If the name of a *feme covert* is used with that of her husband as a complainant, she is a party to the suit.
2. SALE OF REAL ESTATE. *When irregular, but to the interest of minors to sustain the sale.* If upon an application to the Court of Chancery by a purchaser of land sold under a decree of Court, to set aside the

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sale, it appears to the Court that the sale was merely irregular but not void, and a confirmation thereof would be promotive of the interests of the parties, some of whom are minors, the purchaser will be compelled to comply with the terms of sale; and his title will be perfected by a divestiture of title.

3. *DAME. Sale for partition.* Upon application for the sale of land for partition, upon the ground that a sale will be manifestly for the interest of the owners, it will be sufficient to give the Court jurisdiction and to make the sale valid, if, upon a reference to the master, he takes proof in which witnesses state that a sale will be to their interest, and give reasons or facts to sustain that opinion, and the decree of sale pursues the report.

FROM KNOX.

Decree by Chancellor LUCKY, declaring the sale void. The defendants appealed.

CROZIER & REESE, and J. M. KING, for the complainant.

MAYNARD & WASHBURN, and LYON, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

At a sale of the lands and slaves of the estate of Jacob Newman, deceased, under a decree of the Chancery Court at Knoxville, made upon the bill of the defendants, as his personal representatives and heirs, Wm. G. Swan became the purchaser of lots to the amount of about \$4000, for which he executed his notes and made payments according to the terms of the decree. The report of the sale was confirmed by the Court. After paying upwards of \$3000 of the purchase money, Swan filed this bill, impeaching the proceedings as null and void, and praying that they be so declared, and that what he had paid be refunded to him with interest, and the amount unpaid perpetually enjoined. The heirs all resist this application, and insist that the sale be held good.

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The grounds taken against the proceedings, and which it is contended under the decree are void, are two :

1. That the heirs are not all before the Court. There is one *feme covert* and two infants. As to the *feme covert*, Mrs. Gillespie, it appears that her name is not signed with the other complainants to the bill, but it is expressly used with that of her husband, as one of the complainants, in the caption. We are aware of no law that requires any of the complainants to sign a bill. They generally sign a petition, but not a bill, and it is not essential to the validity of either if the names appear in the body or caption of the bill or petition.

The infants were made defendants, but it is insisted that one of them, O. P. Newman, was not served with process. That is a mistake. The sheriff's return of the subpoena is this :

"Executed as to Caroline H. Newman, for herself and as guardian, *also as to O. P. Newman*, September 30, 1855. Executed as to Howard W. Newman, October 1, 1855."

These are the two minor defendants, and their mother, the said Caroline, was their guardian. The construction attempted to be given is, that the service was upon the guardian alone, and not upon O. P., her ward. To put this beyond controversy, the sheriff was allowed to amend his return. But that was entirely unnecessary, as the return is sufficiently explicit, and it is strange there should have been any doubt about it.

The parties, then, were all properly before the Court, and there is nothing in this objection. This being so, it might be unnecessary to consider the objections taken to the regularity of the proceedings under which the sale was made, because, as between the purchaser and the infants, where we can see that the sale was advantageous to the latter, and that a loss would result from setting it aside, we would not do so, for irregularities or defects which can be cured by decreeing the title to the purchaser, as we have all the parties before us. The purchaser can only claim the title, and that can be given to him notwithstanding there may be defects in the proceed-

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ings of such a character as that the infants would not be bound by them. But if it is clear to the Court, as it is in this case, where the property has since the sale depreciated in value, or on any other account, that it is to the interest of the infants that the sale should be maintained, that will be done by a divestiture of their title in favor of the purchaser, and holding him to his contract. All he can demand is a good title, and if the Court is able to give him that, he has no reason to complain that the proceedings were irregular; that is nothing to him. This, of course, can only be done where the parties interested are all before the Court, and a case is made out to give the Court jurisdiction. Otherwise the Court could not decree him a good title, and for that reason would not compel him to pay his money. The case of *Rowan v. Pope*, decided at the last term at Nashville, and to be reported in the next volume of reports, was very similar to this in its principle.

The Court will afford to the infants the proper protection, by securing to them the benefits of an advantageous sale, and to the purchaser, by securing to him a good title. That is all he expected when he purchased, and that we are able to give him by a decree investing him with the title of all the parties before us, both minors and adults.

But, *secondly*, this sale is not void by any of our adjudications. What are the objections to it? The bill of the heirs was based upon two grounds, viz: That the sale was necessary for the payment of the debts of the estate as well as for partition.

A reference was made to the master to take proof, and report upon both points, and the general assets. He reported that the estate was largely indebted, and that although the personal property and choses in action were nominally more than sufficient to meet the debts, it might be necessary to sell the land and slaves. But he failed to give a schedule of the debts. This should have been done as near as practicable. Upon the other ground, the clerk reported that it would be to the interest of the heirs to sell the real estate, as well for the

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payment of debts as for partition. The witnesses examined by him gave their opinions distinctly, and a reason to support them. The Chancellor considered the case made out, and decreed the sale, in which decree the grounds prescribed by the statute were assumed to exist. *Davidson v. Bowden*, 5 Sneed, 129, is relied upon to sustain the objections in this case. That was entirely a different case. There a widow filed a petition in her own name and that of six minor children, of whom, she stated, she was guardian, in Mississippi, where they all resided, without making them defendants, the master barely reported that the land could not be divided among the heirs "to advantage," and had only the *opinion* of one witness to that effect, without any facts or reasons; and even the decree did not assume that the lands could not be divided, nor that it would be to the "*interest of the heirs to have a sale.*" So, in that case, none of the grounds prescribed in the statute, to authorize a sale, appeared either in the proof, report, or decree. It is an entire perversion of that case to apply it to one like this.

These proceedings ought to be carefully guarded for the protection of infants and married women; but where we can see that the parties are all before the Court, and the proceedings are in substantial conformity to the statute, we will not set aside sales for the benefit of purchasers to the prejudice of infants.

The Chancellor declared the sale void, released the purchaser, and ordered that the lots be held bound for the money he had advanced, with interest, now upwards of four thousand dollars, and that the lots should be sold to reimburse him. This was a very thorough uprooting of all that had been done against the earnest protest of all concerned in the sale, and in the face of their propositions to make the title good by decree of divestiture or otherwise.

This decree will be reversed, the purchaser's bill dismissed with costs, and the case remanded for such further orders and decrees as may be necessary to collect the balance of the purchase money, and perfect the title to the purchaser.

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WILLIAM M. ACUFF *et al.* v. J. W. RICE *et al.*

LIEN. Priority. Attachment. *Lis pendens.* A. held an equitable title to a tract of land. He executed a mortgage to the same to B. and C., his endorsers, to secure them in their liability for him. He subsequently sold the land and transferred the title bond to D.—there remaining a balance of the purchase money unpaid. To secure this, A. executed a deed of trust to a slave, which had been, previously, conveyed by deed of trust, but the debts therein secured had been paid, except a balance of \$140. B. and C. filed a bill to foreclose their mortgage, and, also, to have the equity of A. in the slave applied to any balance due them remaining unpaid from the proceeds of the land. D. filed a cross-bill and attached the slave. B. and C. were not judgment creditors; and D. did not state proper grounds for an attachment in his bill. Held:

1 That B. and C. were entitled to have satisfaction of the money they had paid as endorsers, out of the land. The proceeds of the slave to be applied to the payment of the \$140, and the remainder of the purchase money due on the land.

2. If B. and C. had been judgment creditors, and had had their execution returned *nulla bona*, their suit would have fixed a lien upon the equitable interest of A. in the slave, by the principle of *lis pendens*, which would have priority over the lien of the attachment of D., even if the latter had been regular.

3. B. and C. not being judgment creditors, and the attachment of D. having been irregularly issued, they are to be regarded as general creditors, and equally entitled to the equity of A. in the slave, after satisfying the liens created by the deeds of trust.

FROM HAMILTON.

This cause was determined by Chancellor VAN DYKE, who pronounced a decree for the complainant, in the cross-bill. The complainants in the original bill appealed.

FRAZIER, and WELCKER & KEY, for the complainants.

HOPKINS & WALKER, for the defendants.

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CARUTHERS, J., delivered the opinion of the Court.

A question of priority of satisfaction, between the complainants and defendant, Rice, out of the proceeds of a negro girl slave, named Mary, is raised in this case. Both are creditors of defendant, Robert W., the owner of the slave, and one must lose, as Robert is insolvent, and the fund not sufficient to satisfy both. The Chancellor decided in favor of Rice.

Facts: The complainants, Acuff, Billingsly, and Greer, became liable as endorsers in Bank for Robert, in a note dated November, 1856, which they have paid. On the 15th of March, 1857, to secure themselves against loss, they took a mortgage on five acres of land, to which said Robert had an equitable right by bond, with an incumbrance of \$167 of unpaid purchase-money. This mortgage-deed was duly registered. On the 9th of January, 1858, Robert sold the same land to said Rice for \$450, and assigned to him his title-bond. Rice had no *actual* knowledge, as it seems, of the mortgage upon the land, but was informed that there was still remaining due to the vendors \$167. To relieve the land of that, he caused the said Robert to secure its payment by a deed of trust upon his negro girl, Mary. There were other deeds of trust upon the slave, which had been ratified, with the exception of a balance of about \$140 due to Rankin. This bill was filed on the 14th of April, 1858, to foreclose the mortgage upon the land, as the said bank debt had fallen upon complainants. Rice, among others, was made a defendant on account of his claim to the land. Charging that the land would fall far short of indemnifying them, and so it turned out, they ask that whatever equitable interest the said Robert has in the slave Mary, after discharging the liens upon her, be applied to the satisfaction of the balance that may remain of their claims beyond the value of the land. The trustees and beneficiaries in the deeds for the slave are made parties. Rice answered this bill on the 28th of April, and, on the fifth of the next month, filed what is called a cross-bill, to attach the slave Mary, to

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have her sold to satisfy his claim of \$450—the consideration paid for the land in the event it should be taken from him by the prior title of the original complainants. The attachment was issued and executed.

By an interlocutory decree, the debt of complainants was declared to be \$678, that of Rice \$463.95, the vendor's lien \$183.37, and the balance due to Rankin on the slave \$141. The land and slave were decreed to be sold. The land sold for \$250, and the slave for \$710.

The Chancellor, in his final decree for the distribution of the fund, ordered that the vendor's lien should be discharged out of the proceeds of the land, and the balance thereof, after paying the cost of the original suit, should be paid to complainants; and after deducting the cost of the cross-bill, and paying Rankin his debt of \$141, Rice should be paid his debt of \$463.95, out of the proceeds of the slave, and if any balance remained, it should go to complainants. This would leave only \$67, after deducting the \$183, of the price of the land, out of which the costs, amounting to \$38.68, are to be first paid, and the balance of \$29, only, to go to the complainants. The costs of the cross-bill amounting to \$70.45, and the amount due to Rankin \$141, being deducted from the \$710, for which the slave sold, would leave \$498.55. So Rice would get his whole claim, and leave \$34.60 for complainants, making in all for them \$63.60, leaving a loss of \$614.

It seems to us very clear, that the \$183.37 due to the original vendor, should be paid out of the proceeds of the slave, and not the land, as between the common creditors. The vendor could look to either. The land, because of his lien upon it; and the slave, because of the deed of trust. The common debtor, at the instance of Rice upon his purchase of the land, interposed the slave for the relief of the land as to the lien for this unpaid purchase money. It would be inequitable, now that conflicting interests have arisen, to throw this burthen back upon the land, where it is not necessary for the protection of the vendor's debt. Both funds are liable

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to him, and he has, therefore, no interest in the question. This \$183, then, should be paid out of the proceeds of the slave, instead of the land, and would leave \$527. How this should be appropriated, is a more difficult question. The complainants, in the original bill, are first in time, and are properly in Court to foreclose their mortgage; but they go beyond that, and aim to reach the equity of their debtor in the slave, for the satisfaction of whatever may remain of their debt after the application of the land. They are not judgment creditors with an execution at law returned *nulla bona*. Without this, can they come into a Court of Chancery to reach the equitable rights of their debtor in this slave? If they can, then they have a lien fixed by their suit, and Rice could not prevail against them, even by attachment properly and legally issued, because by the doctrine of *lis pendens*, having asserted their right to have satisfaction out of that particular property, neither the debtor by sale, or any one coming in upon his rights, could defeat them by suit or otherwise. But have they any standing in Court upon this part of their case without judgment, &c., at law, so as to produce these results? But it is a serious question, whether the failure to demur to that part of the bill removes the difficulty since the act of 1852. Upon the other hand, Rice obtained his attachment without any sufficient ground laid in his bill, and could hardly be regarded as a creditor at that time, as the land had not then been taken from him. But there is no plea or demurrer to his bill. Without deciding these questions, now, under all the circumstances, we think it would be just and equitable to regard them both as general creditors, and that after discharging the lien upon the slave in favor of Rankin, and of the vendors of the land under the two deeds of trust, and paying the cost of the cross-bill, the remainder of the proceeds of the slave shall be equally divided between the complainants in the original and the cross-bills, as their debts are nearly equal, after applying the land to Acuff's claim. The proceeds of the land, after paying the costs of the original bill, shall be paid to Acuff,

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the mortgagee. This will leave a loss of nearly an equal amount upon both parties.

The decree will be so modified, and the causes remanded for execution of the decree.

JAMES N. PARKS, FOR THE USE, &C. v. JACKSON McKAMY.

CONTRACT. Illegal. Fraudulent. The fraud may be shown by the defendant. It is well settled that an action will not lie to enforce a contract made in violation of a statute, or of the common law, or which is criminal in its character, or against public policy. The defendant, not because of any favor to him, but because he is such, can allege and show the invalidity of the contract, and thereby defeat the action.

FROM ANDERSON.

This cause was heard before BROWN, J., verdict and judgment for the defendant. The plaintiff appealed.

YOUNG, for the plaintiff.

WHITSON and HUMES, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is an action upon a bond executed by the defendant, McKamy, to James N. Parks, on the 28th of June, 1856, for \$166.50, payable in good bank notes.

There was proof tending to show, that this bond was executed as a fraudulent device, to hinder and delay the creditors of Parks in the collection of their debts, out of certain personal estate, which he pretended to sell to the defendant, and

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in consideration of which the bond was given, when, in truth, he never received anything for the bond, and the property was never delivered to him, or intended to be; but the same was kept by Parks, and, subsequently, converted to his own use.

The Circuit Judge instructed the jury, that if the bond was given for the personal property of Parks, for the purpose of hindering, delaying and defrauding his creditors, or if the consideration had failed, the plaintiff could not recover. In this there is no error. No principle of law is better settled, than that an action will not lie to enforce a contract made in violation of a statute, or of the common law, or which is immoral in its character, or against public policy. The parties stand in equal guilt, and neither will receive the aid of a Court of Justice. In such a case, it is said, the defendant is in the better, that is, in the safer attitude, he being required to say, or do nothing; while his adversary is the *actor*, and has to show the case. The *defendant*, not because of any favor to him, but because *he is such*, can, upon well settled principles, allege and show the invalidity of the contract. This does not impair the rule that the parties to a conveyance to defraud creditors are bound by it, since neither can invoke the aid of a Court of Justice to undo it.

It is unnecessary to inquire whether the defence could have been made at the common law, the instrument sued on being under *seal*; because, under our system, the seal is immaterial. The consideration of a bond may be inquired into in a Court of Law, and defence made against its collection, because of its illegality, or want of consideration, as readily as to unsealed instruments.

In support of this opinion, we refer to *Vincent v. Groom*, 1 Yer., 480, and *Allen v. Dodd*, 4 Hum., 131.

The judgment of the Circuit Court will be affirmed.

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THE STATE v. FIELDING PENNINGTON.

1. CRIMINAL LAW, *Eaves-dropping*. Eaves-dropping is the nuisance of listening under walls or windows, or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.
5. SAME. *Same*. *Eaves-dropping the grand jury*. A person who secretly and stealthily approaches near to the room occupied by the grand jury, while they are engaged in the performance of their duties for the purpose of overhearing what is there said and done by the grand jury, is guilty of eaves-dropping.

FROM SCOTT.

The indictment was quashed by Judge GARDENHIRE. The State appealed.

HEAD, Attorney General, for the State.

MYNOTT and SCOTT, for the defendant.

CABUTHERS, J., delivered the opinion of the Court.

This was an indictment for *eaves-dropping*. It was quashed by the Circuit Court, and the State appealed.

The charge is, that the defendant, "unlawfully and stealthily did approach and come near to the room where the jurors aforesaid, were then and there assembled for the purpose of considering and transacting such business as was properly before them as jurors, as aforesaid; the said jurors then and there being convened and assembled, as a grand jury for the county of Scott, he, the said defendant, then and there being, as aforesaid, did unlawfully, for the purpose of listening to, and overhearing what was then and there said and done; did then and there unlawfully and stealthily eaves drop, and lis-

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ten to the proceedings in the room aforesaid, and was then and there guilty of the crime of eaves-dropping, to the evil example," &c.

The Court below was of opinion that this indictment did not set forth an indictable offence, and quashed it.

That eaves-dropping is an indictable common law offence, was decided in this State at a very early day, in the case of *The State v. Williams*, 2 Tenn. R., 108.

Blackstone defines it thus: "Eaves-droppers, or such as listen under walls, or windows, or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance." 4 Bl., 168.

Bishop says: "It consists in the nuisance of hanging about a dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood." 2 Bish. Crim. Law, 274.

The indictment was doubtless drawn up in haste, and if not void, it is certainly without form. Yet, it is easy to see from it what is the charge to be answered, and it is set forth with reasonable certainty.

We adopt the definition of the offence given by Blackstone, as the true description of the offence, and by that test the present case.

The acts imputed to him in the presentment, is, that he stealthily, that is, secretly, or clandestinely, approached near to the room occupied by the grand jury, where, and while they were engaged in the performance of their duties, for the "*unlawful purpose of listening to and overhearing what was then and there said and done.*"

It is difficult to conceive of a more mischievous species of this offence, than that now presented. The members of the grand jury are required, by their oath, to keep their counsels secret, and are not permitted to disclose their own acts. This is a rule adopted upon the soundest policy. It produces free, and unrestrained disclosures and consultations in relation to their duties, and saves them from persecution or injury from the violent and unprincipled, upon whom it may be their duty to

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inform, or against whom they may feel bound in the discharge of their duty, to act or vote. But, in addition to these considerations, it is necessary for the ends of justice, to keep their proceedings secret, so that information may not reach offenders of forthcoming charges against them, and thereby enable them to escape. All these evils, and more, would result from eaves-dropping. If it be an indictable offence to clandestinely hearken to the discourse of a private family, by which only a private injury would be done, much more must it be to obtain, by the same unlawful means, the secrets of the jury room. The same salutary principle must cover both cases, and for a much stronger reason the latter. If the one be a nuisance, much more is the other. The proceedings of juries, both grand and petit, are so important to the life, liberty and property of the citizen, that they cannot be too carefully guarded. Invasions of the sanctity of the jury room cannot be too severely punished. No intrusions upon their deliberations can be tolerated. The Courts are too remiss in the discharge of their duties on this subject. It cannot be that the law has made no provision for the punishment of offences like this. We think it has, and, therefore, reverse the judgment quashing this presentment, and remand the case for trial.

ROBERT SNODDY v. EMILY KREUTCH.

1. LAND LAW. *Trespass quare clausum fregit*. Possession. In an action of trespass *quare clausum fregit*, the plaintiff is not entitled to recover unless he show an actual possession or a valid title in himself to the premises in dispute.
2. SAME. *Presumption of a grant*. Statute of limitations. The statute of limitations cannot operate to confer title, nor can a grant be presumed, unless the party claiming the benefit of the statute, or pre-

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sumption, proves an *actual* possession of the land. A mere claim of ownership, or the taking of timber from the land, unsustained by *actual* possession, will not be sufficient.

3. **SAME. Same. Same.** Nor will the mere parol declarations, acts, or acquiescence of the adverse claimant be sufficient for this purpose, unaided by the possession of such adverse party.
4. **SAME. Statute of limitations. Possession of some part in dispute.** Possession of land so as to produce the bar, must be an actual possession of some part of the land in dispute.
5. **SAME. Same. Same. Presumption of a grant. Constructive possession.** The party who has the legal title to land, has the constructive possession of the same. And to overcome that possession, and perfect title, by operation of the statute of limitations, or create the presumption of a grant to said land, there must be an actual possession of some part of the land in dispute. A possession within the boundaries of a deed covering the land, but without the disputed land, will not be available.
6. **SAME. Presumption of a grant cannot extend beyond the possession.** The possession is the sole foundation of the presumption of a grant, and the title cannot be made to extend beyond that possession.

FROM KNOX.

This cause was tried before Judge GAUT. The complainant appealed.

CROZIER & REESE, MAYNARD & WASHBURN, for the plaintiff in error.

LYON, TRIGG, TEMPLE and HUMES, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This is an action of trespass *quare clausum fregit*, commenced the 22d of January, 1853, for cutting and carrying away certain timber trees. Verdict and judgment were rendered for the plaintiff in the Circuit Court, and the defendant has appealed in error to this Court.

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The determination of this cause depends entirely upon the title of the particular piece of land upon which the trespass is alleged to have been committed; for it is conceded here, and abundantly shown in the record, that this land is wild and un-enclosed; the same never having been cultivated, or *actually* possessed by either party. Unless, therefore, the plaintiff has shown a valid title in himself, he must fail in his action, as otherwise he can have no constructive possession.

In order to make out his title, the plaintiff read a deed from Robert Miller to Samuel Tillery, dated the 27th of August, 1857, for 120 acres, which includes the land in dispute; and various intermediate conveyances from said Tillery to himself of the same land. He also read a deed from William Tyrrell to Charles McClung, dated the 9th of March, 1798, for 1000 acres, which also embraces the land in dispute; a deed from William Mills to Charles McClung, dated the 11th of November, 1799, for 184 acres; and a deed from Tyrrell and McClung to Hugh Dunlap and Robert Miller, dated the 8d of May, 1800, for said 1000 acres, with a reservation of certain portions thereof which had been previously conveyed to others. It seems doubtful whether this last deed embraces the land in dispute. The plaintiff did not read, or connect himself with any grant, either to said Tyrrell, McClung, or other person.

The defendant read and relied upon a grant from the State of Tennessee to Henry Monker, dated the 29th of June, 1810, for 84 acres, which also includes the premises in dispute, and mesne conveyances of the same from said Monker to himself.

It will thus be seen, that testing the case by the deeds, or documentary evidence adduced by the parties, the defendant has the superior title; and that in truth, his title aside, the plaintiff has altogether failed to show any reliable title in himself. To avoid this result, he insists that he has title by the statute of limitations, and by the presumption of a grant founded upon twenty years enjoyment. He does not contend upon any actual possession of the disputed land which appears to

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be common to both, the title of the plaintiff and defendant; but he maintains that he has had twenty years actual possession of *other portions* of the 120 acres; which gave him *constructive* possession of the *whole*; and though he has not read a grant to the 120 acres, yet, that the grant to Monker covers the disputed land, and enables him to rely not only upon the presumption of a deed or grant, but also upon the statute of limitations. We do not see how either of these positions can be maintained. The evidence in this record, it seems to us, fails to show either seven or twenty years actual possession of any part of the 120 acres. And it is a very clear rule of law, that the statute of limitations cannot have effect to confer title, or the existence of a grant be presumed, unless the party claiming the benefit of the statute, or presumption, proves the actual possession of the land. The party's claim of ownership, or the taking of timber from the land, unsustained by actual possession, cannot have the effect. *Cutter v. Blackman*, 2 Car. Law Repos., 566; *Daney v. Sugg*, 2 Dev. & Batt. R., 515; *Jones v. Huggins*, 1 Dev. R., 228. Nor will, as we believe, the mere parol declarations, acts, or acquiescence of Snoddy, and his vendors. *Rogers v. White*, 1 Sneed, 68; *Jackson v. McCall*, 10 Johns. R., 377. These must be aided by the possession of the adverse party, otherwise, it is to establish title in the plaintiff by parol evidence, which cannot be done.

But if we concede the actual possession, as claimed by the plaintiff, the result must be the same. The proof shows that Monker and his successive vendees, including Snoddy, have held actual and continual possession of a part of the 84 acre grant from the year 1812, to this time, claiming the land covered by the grant; but, as before stated, the actual possession of neither party ever extended to the land in dispute.

In such a state of facts it is clear, according to *Talbot v. McGavock*, 1 Yer., 262; *Smith v. McCall's heirs*, 2 Hum., 163; *Stewart v. Harris*, 9 Hum., 714, and *Tilghman et al. v. Baird*, 2 Sneed, 196, the statute of limitations can have no effect. Possession of land, so as to produce a bar, must

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be an actual possession of some part in dispute. And this would be so, if Snoddy and his vendors never had actual possession of any part of the Monker grant, for having the superior title, the law adjudges the possession in them to the extent of their grant. *Talbot v. McGavock*, 1 Yer., 269-270; *Fitzrandolph v. Norman et al.*, Taylor's N. C. R., 127; *Stewart v. Harris*, 9 Hum., 714.

And it is alike plain, that no grant can be presumed in favor of the plaintiff, or his vendors. The case of *White v. Laverder*, 5 Sneed, 648, is a direct authority. Also, Taylor's N. C. Rep., 127, 142, and *Stewart v. Harris*, 9 Hum., 714, 716. Their supposed constructive possession of the disputed land, upon which alone the presumption of a grant must rest, never existed. It was excluded by the superior title of the Monker grant, and the possession under it. And it can make no difference, if the fact be so, that Monker and his vendees were ignorant of the true boundaries of his grant, or that they were not visible and known; or that they, for a time, supposed them to fall short of the disputed premises. The law still adjudged them to hold and be in possession, according to the legal effect and true boundaries of the grant, unless they had been legally changed by a *conventional* line. *Rogers v. White*, 1 Sneed, 68, 75; Taylor's N. C. Rep., 127, 142; *Record v. Williams et al.* 7 Wheat., 59.

It seems to us, the legal effect of the deed from John Hillsman to Snoddy, was to convey the entire Monker grant. But if it did not, the result is the same, as the deed bears date the 15th of August, 1848; and the anterior title and possession of Monker and Hillsman prevented any constructive possession of the disputed land in the plaintiff, or his vendors.

The Circuit Judge, in effect instructed the jury that the existence of the grant to Monker, and the possession under it, did not stop or defeat the legal presumption of a grant in the plaintiff, or those under whom he derived title.

This instruction, according to the principles above laid down, is erroneous.

The Circuit Judge also erred in instructing the jury that

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the law presumed a grant to have issued to Tyrrell, or Tyrrell and McClung, for the disputed land, and if it was embraced within the calls of their title deeds read, and had been regularly conveyed down to the plaintiff, he had the older and better title ; and if the defendant had entered upon the land and cut the plaintiff's timber, or authorized it to be done, he was guilty of a trespass, and they ought to find for the plaintiff.

It is not pretended that the possession on which the plaintiff relies, began, or had any existence, prior to the date of the deed from Robert Miller to Samuel Tillery, on the 27th of August, 1817. How then could a grant be presumed anterior to that time ? How could it be presumed in Tyrell, or Tyrell and McClung, who never had possession ? How could it relate to the year 1798 or 1799 so as to overreach Monker's grant in 1810 ? We know of no authority in support of the charge. The possession is believed to be the sole foundation of the presumption of a grant ; and it is not seen how the title can be made to extend beyond it. If it may be extended at all, why not indefinitely ? The books say, when the uninterrupted enjoyment has been continued for twenty years, the law supposes that the claim of him who possesses had a just and legal origin. But upon what authority can we say it originated prior to the possession ? We think none. *Hanes v. Peck's Lessee*, Mar. & Yer., 231 ; *Chilton et al. v. Wilson's Heirs*, 9 Hum. 399-405 ; *Cannon v. Phillips*, 2 Sneed, 211 ; *White v. Lavender*, 5 Sneed, 648-652.

The calls of the survey on the 23d of June, 1809, upon which the grant to Monker issued, are very particular and specific. They are so both in the survey and grant, and would seem to leave little doubt as to the true locality of the lines and corners of this grant. Whether they were actually marked, and if marked at the place designated in the survey and grant, and whether they correspond with what is called the Tillery line, or vary from it, does not distinctly appear in the record. It is to be inferred, however, that these lines do not agree. And we cannot, from the facts disclosed, say with

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certainty whether the boundary was so ascertained and defined as that a parol agreement for a different one would not be binding upon Monker and his vendees, within the rule of *Nichol v. Lytle*, 4 Yer., 456, *Lewallen v. Overton*, 9 Hum., 76; *Houston's Heirs v. Matthews*, 1 Yer., 116, and other authorities. And if it were a case where they could be bound by parol agreement to a boundary different from that established in the title papers, whether it is to be inferred from circumstances that they ever did agree upon the Tillery line, is a matter we need not now consider. Nor do we now inquire whether it be indispensably necessary to the recovery of the plaintiff that he deraign a superior title from the State; and whether he may not entitle himself to have a grant presumed to the disputed premises, by showing twenty years' actual enjoyment of some part of the one hundred and twenty acres, and that Monker and his vendees fixed a boundary to his grant which did not include the disputed land, thereby breaking the force of their constructive possession. *Jackson v. McCall*, 10 Johns. R., 377; *Rogers v. White*, 1 Sneed, 74, 75.

These matters were not directly considered by the Court and jury, and, as to them, the case is not fully presented; and as the judgment of the Circuit Court must necessarily be reversed for the errors contained in the Circuit Judge's instructions, we leave them, without further comment, for proper consideration upon the next trial.

Judgment reversed, and cause remanded.

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W. D. FAIN, ADM'R v. T. M. JONES, ADM'R, *et al.*, AND M.
A. CASSADY, EX. v. T. M. JONES, ADM'R, *et al.*

1. PARTNERSHIP. *How claims of creditors worked out. Lien.* The general creditors of a firm have no lien upon the partnership assets if the partners themselves have none. The claim of the creditors must be worked out through the equities of the partners; and if they have none, the creditors can have none.
2. SAME. *Lien. Chancery. Rights of an attaching creditor, and one owing the debtor.* If merchandize is placed in the hands of a firm for sale, the owner of such merchandize being indebted, at the time, to the firm, in a contest between the firm and an attaching creditor of the owner, the firm is entitled to priority of satisfaction of their indebtedness; and, *a fortiori*, would this be so if the merchandize was placed in the hands of the firm in payment of their indebtedness.

FROM JEFFERSON.

Chancellor LUCKY, pronounced a decree for the defendants.
The complainants appealed.

SWAN, for the complainants.

McFARLAND, and CROZIER & REESE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The complainant, Fain, as the administrator of Moore, is a creditor of the firm of Jones & Smith—composed of James H. Jones and Caleb Smith—and files this attachment bill with a view to reach certain funds and assets in the hands of the firm of James H. Jones & Co., which he alleges are equitably liable to the satisfaction of his demand. It is shown that this latter firm received from the firm of Jones & Smith certain spun thread, and other merchandize, which have been converted into money; and relief is sought upon the ground that

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Jones & Smith, which the creditors of the latter firm have a right to subject to the payment of their debts. The partnership of James H. Jones & Co. was the said James H. Jones and William P. Jones, who were brothers, and both of whom are dead—the latter having survived the former. The defendant, T. M. Jones, is the administrator of the said William P. Jones, into whose hands, as the surviving partner, the assets of said firm went; and the decree is sought against the said T. M. Jones in his representative capacity.

The complainant, M. A. Cassady, is the widow and executrix of James H. Jones, and files her bill seeking the very same decree demanded by the said Fain, namely, that the debt due the estate of said Moore may be paid by the assets of James H. Jones & Co., in the hands of T. M. Jones, as the administrator of William P. Jones, upon the footing of the indebtedness of said firm to the firm of Jones & Smith.

The complainants, in each of these bills, must stand or fall upon the rights and equities of the said James H. Jones and Caleb Smith. If they could have no valid claim to the decree now sought against T. M. Jones, as the administrator of William P. Jones, neither can Fain, as a creditor of Jones & Smith, or Cassady, as the executrix of James H. Jones. The general creditors of a firm have no lien upon the partnership assets if the partners themselves have none. The claim of the creditors must be worked out through the equities of the partners; and if they have none, neither have the creditors.

The inquiry here then must be, what were the equities of the firm of Jones & Smith against James H. Jones & Co.? Could the former firm have had a decree against the latter upon the principle of these bills? James H. Jones & Co. were merchants, but in order to collect the debts due them from their creditors, occasionally purchased and drove hogs into the Southern market for sale. In the fall of 1848 they purchased a drove, which, with some of their own—in all over three hundred head—they carried to the State of North Carolina, and, at the house of one Barkley, as we are satisfied from the proof, sold them to Jones & Smith, who, after

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they had disposed of them by sale, purchased of said Moore another lot of hogs upon time. In this way the debt to said Moore was created. The spun thread, and other merchandize above mentioned were derived from the sales of this latter drove, and were placed in the hands of the firm of James H. Jones & Co. by Jones & Smith, in the lifetime of James H. Jones. The sale of the hogs at Barkley's, unless then paid for, created, of course, a debt from Jones & Smith to James H. Jones & Co. We have not the least evidence that any payment was then made. None is spoken of by the witnesses, and we are not authorized, from anything in this record, to suppose there was any. It would have been unusual, and we do not believe that Jones & Smith had the means to do so. The burthen of proof, as to this matter, is upon complainants, and the presumption of indebtedness is not removed. This is decisive of the case. It is certainly true that it is not directly shown on what account this thread and merchandize were placed in the hands of James H. Jones & Co. But it is shown to have been done with the assent of both Smith and James H. Jones. The latter declared that he had exchanged the bacon for spun thread, to go to the firm of James H. Jones & Co. But this is immaterial. Whether it were directed to be sold and applied to the indebtedness to this last named firm, or was only placed with them on deposit for sale, it would, upon general principles, be alike inequitable and unjust to prevent Jones & Smith, or the complainants, to subject this fund, so long as the indebtedness to James H. Jones & Co. remained, unless there be an excess beyond what will pay them, which is not the case here. If it were intended to be a payment, as we are inclined to believe, then there was nothing to attach. And in either aspect of this case, the equity of the defendants to hold this fund is superior to that of complainants. This will appear from the case of *Nolen v. Crook et al.*, 5 Hum., 312.

We are satisfied that Smith had no interest in the hogs purchased by James H. Jones & Co. until he and James H. Jones purchased them at Barkley's; and that William P.

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Jones had no share in either of the droves after that time, and his repeated statements that he had not, had reference to this period, since, it is clear, he had an interest in the first drove, until the sale above spoken of. And his anxiety that Jones & Smith should not lose upon the hogs, is readily accounted for in his desire to save the debt to James H. Jones & Co.

It is true that nothing appears upon the mercantile books of James H. Jones & Co. either as to the indebtedness of Jones & Smith to them, or as to the proceeds of the sale of the thread and other merchandize. But we think this can make no difference, since there must have been an indebtedness to James H. Jones & Co. for the hogs sold at Barkley's; and we are wholly unable to see how it was paid unless in the *proceeds* of the thread and merchandize; and it is shown that the books of this firm were not very accurately kept.

It is supposed and argued that there is a fatal conflict between the answer filed by the defendant, T. M. Jones, to the bill of M. A. Cassady, and the one subsequently filed to the bill of Moore. But we think both answers may very well stand together, and are consistent.

The same result might, perhaps, be attained upon other grounds. The Chancellor denied complainants any relief, and we affirm his decree.

J. H. TEDFORD v. JAMES WILSON *et al.*

• **REGISTRATION.** *Lien. Contract. Personal chattels. Creditors.* As against creditors a *lien* cannot be created by contract between the parties, upon a personal chattel in existence at the time of such contract, without registration. This principle does not apply to an

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agreement that the *future products* of the farm, not *then* in existence, shall be first subject to the satisfaction of the employee's wages. Such a contract does not fall within the letter or spirit of the registration act.

FROM BLOUNT.

The bill was dismissed by VAN DYKE, Chancellor. The complainant appealed.

O. P. TEMPLE, for the complainant.

WALLACE & MCGINLEY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an injunction bill. The case is this: On the 8th of January, 1856, one McTier employed Tedford to manage the farm of the latter. Tedford was to reside on the farm, together with his family, and to devote his whole time and attention to its care and management. And as compensation for his services, McTier was to pay him, annually, the sum of \$350. The written agreement between the parties contains this provision: "It is further agreed and understood, that the *proceeds* of the farm is to be liable to said Tedford for his wages."

In the latter part of the year 1856, the defendant, Wilson, who was a judgment creditor of McTier's, caused a portion of the crop raised by Tedford that year, under the foregoing agreement, to be levied on as McTier's property, in satisfaction of his judgment. And to restrain the sale thereof, this bill was filed. The bill was not demurred to. On the hearing, the Chancellor dismissed the bill.

We think the decree is erroneous. It is true, that as against creditors, a *lien* cannot be created by contract between the parties, upon a personal chattel in existence at the time of such contract, without registration. But that principle is not

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applicable to the present case. This was simply an agreement, that the *future products* of the farm, not *then* in existence, should be first subject to the satisfaction of Tedford's annual wages. This is not a contract or agreement falling within either the letter or spirit of the registration act. *Woods v. Burrough*, (MS.) Whether or not the complainant ought to have been repelled, on the ground that his remedy was in the legal forum, is not now a question open to discussion. By omitting to demur to the bill, this objection is waived.

Decree reversed.

THE MASONIC EDUCATIONAL ASSOCIATION OF CHATTANOOGA
v. HENRY J. COOK.

JUDGMENT. *By default, when final. Jury.* If the defendant in an action fail to appear and defend, within the time prescribed by law, judgment by default may be rendered against him. If the action is founded upon a bond, bill of exchange, promissory note, or a liquidated account signed by the parties, so the amount can be ascertained by a simple calculation upon the papers filed, the judgment may be final. In all other cases, the intervention of a jury is necessary to ascertain the amount due.

FROM HAMILTON.

The plaintiff in error was sued in debt, in the Law Court of Chattanooga, on an open account. At the March Term, 1859, GAUT, J., presiding, judgment final, by default, was rendered against him, for \$466.92 and costs. He appealed in error.

J. L. HOPKINS, for the plaintiff in error.

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BRABSON & LYLE, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This is an action of debt. The declaration, which was filed at the return term of the writ, seeks to recover a specific sum, namely, four hundred and sixty-six dollars and ninety-two cents. The cause of action is stated to be for work and labor done, goods sold and delivered, and money paid, laid out and expended.

At the next succeeding term of the Court, after the filing of the declaration, the defendant having failed to make any defence, judgment final, by default, was taken in favor of the plaintiff for the amount demanded in the declaration, with costs, without the intervention of a jury.

This judgment, we think, is erroneous. In section 2951 of the Code, it is provided, that if the defendant fail to appear and defend at the time prescribed by law, judgment by default may be taken against him. And in section 2952, in such case, the judgment is final, if the amount of the plaintiff's claim can be ascertained by simple calculation from the papers; when the amount cannot thus be readily ascertained, the damages will be assessed by a jury impanelled at the same term for the purpose.

The term papers here, refers to the writing or other evidence, upon which the action is founded, and not to the pleadings in the cause. It was doubtless intended to apply to suits instituted upon bonds, bills of exchange, promissory notes, liquidated and signed accounts, and the like, from which the amount due the plaintiff could be readily ascertained by simple calculation. In all other cases, the intervention of a jury is necessary to ascertain the sum due the plaintiff.

The use of the word damages might seem to imply, that in actions of debt, the jury need only assess the interest upon the claim. But we think it apparent, from these and other provisions in the Code, that a more comprehensive meaning was intended by the Legislature, and that in all such cases,

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where a jury are required to be impanelled, they should pass upon the measure of the recovery to be had by the plaintiff, without regard to the form of the action. Code section 2746.

The judgment of the Law Court of Chattanooga will be reversed, and the cause remanded to that Court, to the end, that a jury may be impanelled to ascertain the amount due the plaintiff.

JOHN S. WALKER v. GALBREATH AND GAMBREL, *Admrs., &c.*

1. **BILLS AND NOTES.** *Note executed to partners or joint payees, vests in the survivor. Parties. Partnership.* If a note is executed to two as partners or joint payees, upon the death of one, the legal title and right of suit in the note, would vest in the survivor; and his personal representatives could maintain an action upon it.
2. **NEW TRIAL.** *Not granted if there is any evidence to sustain the verdict.* If there is any evidence to sustain the verdict, a new trial will not be granted by the Supreme Court.

FROM HANCOCK.

Verdict and judgment for the plaintiffs, PATTERSON, J., presiding. The defendant appealed.

M. T. & L. C. HAYNES, for the plaintiffs in error.

NETHERLAND & HEISKELL, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This case originated before a justice of the peace. There were six separate suits, upon so many distinct claims. Judg-

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ments being rendered against the defendant below, he appealed to the Circuit Court, where the cases were, by consent of the parties, consolidated. Judgments there, also, being against Walker, he has appealed in error to this Court.

The contest here, is as to a note for \$50.20, dated the 24th of January, 1853, made payable by Walker to Moore & McCarty. The warrant, or summons, sued out upon this note, was to answer the complaint of Andrew Galbreath and Wm. P. M. Gambrel, admrs. of A. P. McCarty, deceased, in a plea of debt due by note.

The Circuit Judge charged the jury, that the note being payable to Moore & McCarty, in the absence of proof showing that A. P. McCarty was a member of the firm of Moore & McCarty, and that McCarty was the surviving member of the firm, there would be such a variance between the cause of action set forth in the warrant, and the note read in evidence, as would defeat a recovery under that warrant.

A new trial is now claimed upon the ground that the verdict is against the charge of the Circuit Court, and entirely unsupported in the evidence. It is said there is no proof of the partnership of Moore & McCarty, or that A. P. McCarty was a member of that firm; and more, that he was its surviving member.

It is true, there is no direct evidence of the partnership; but it does distinctly appear, that Walker executed this note to A. P. McCarty *personally*, and the fact that he took it, payable to Moore & McCarty, is *some* evidence that he had an interest in it, either as a partner of Moore, or as a joint payee with him. Besides, it is shown from other portions of the testimony, that A. P. McCarty not only had an interest in this note, but that there was some reason to believe he was *solely* interested in it. The defendant is shown to have treated with him as the creditor and the person who was entitled to collect it; and he expressly promised him to pay it, provided he redeemed a tract of land of one Hipsher. This right of redemption he afterwards sold to Hipsher.

These facts furnish *some* evidence that McCarty had become

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this money constitutes a debt from James H. Jones & Co. to the *legal* owner of this note by the death of Moore, and under our practice, we cannot say the verdict is unsupported.

We may remark, that it is immaterial whether Moore and A. P. McCarty were partners, or joint payees, upon the death of Moore the legal title and right of suit in this note, would survive to McCarty, and his personal representatives might well maintain this action.

In this view of the case, it follows, the Circuit Judge did not err in refusing to withdraw the note from the jury upon the ground of a variance.

The judgment of the Circuit Court will be affirmed.

 THOMAS MCCALLIE v. THE MAYOR AND ALDERMEN OF CHATTANOOGA.

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1. CORPORATION. *Municipal. Contract. Taxation. Legislative power.* The extension of the corporate limits of a town or city, by the Legislature, is an exercise of governmental power of which the persons newly taken in cannot be heard to complain: they have no voice in the matter; no power to resist, nor is any legal right of theirs impinged thereby. An act of the Legislature, therefore, for that purpose, is not in the nature of a contract; and may be changed at the pleasure of the law-making power.
2. SAME. *Same. Same. Same.* The Legislature may surrender the power of taxation, in respect to particular lands, in favor of an individual. But the surrender of this, or any of the rightful powers of government, is not to be presumed; nor is the bestowal of a privilege for a limited time and without consideration, to be taken as obligatory on the Legislature, against a repeal of the privilege.
3. CONTRACT. *Inviolability of. Constitutional law. State.* The provision of the Constitution securing the inviolability of contracts, extends as much to contracts with a State as to contracts between individuals.
4. TAXATION. *Legislative power. Corporation purpose—what. Constitutional law.* It is impracticable to lay down an exact general rule

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by which to determine what is a "*corporation purpose*." The question must, necessarily, be decided in view of the facts of each particular case. The judgment of the local government of a municipal corporation may, in general, be safely taken as *prima facie* evidence, as to whether the object proposed be a legitimate "*corporation purpose*."

5. SAME. *Same. Same. Same. Not necessary that the object be within the corporate limits.* It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. It is sufficient if it be a matter of vital importance to the permanent interests of the corporation, although situated beyond the limits thereof. The appropriation of the money may, even, be made to the construction of a part of a public work lying beyond the limits of the State.
6. SAME. *Proposition submitted to a vote, when.* If the Legislature confers the power, directly and exclusively upon the mayor and aldermen to subscribe stock, &c., it is not necessary that the proposition to do so be submitted to a vote of the inhabitants of the town or city.

FROM CHATTANOOGA.

Bill dismissed by Chancellor VAN DYKE. The complainant appealed.

MINNIS, for the complainant.

WELCKER & KEY, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an injunction bill to restrain the corporation from proceeding to collect a railroad tax assessed upon the lands of the complainant, situate within the limits of the corporation.

It appears that, on the 28th of February, 1854, an act was passed by the Legislature of Tennessee, by which the "Wills' Valley Railroad Company of Alabama" were "authorized and permitted to extend their road from the southern line of this State, in Lookout Valley, to a connection with the Nashville and Chattanooga Railroad, at Chattanooga or elsewhere

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in this State." It seems that the road, as actually located, unites with the Nashville and Chattanooga Road some six miles west of the town of Chattanooga.

On the 21st of August, 1854, by an ordinance of the board, a subscription of \$100,000 of the stock of said "Wills' Valley" Road was made on behalf of the corporation of Chattanooga. The ordinance provides, that the amount thus subscribed should "be applied in preparing for the iron that part of the road lying in Dade county, Georgia, and De Kalb county, Alabama"—that being the portion of the road nearest to the Tennessee line; and the road extending within the limits of this State only about one mile.

It further appears, that prior to the 17th day of February, 1854, the complainant was the owner of a tract of land adjoining the town of Chattanooga, but outside of the corporate limits of the town as then defined; part of which land was then improved and cultivated, and part was woodland. By an act of the Legislature, passed on the day last aforesaid, the corporate limits of the town were extended so as to take in a large quantity of territory not before included; which act contains a *proviso* to the effect that the lands thus taken in "shall not be subject to a corporation tax while held as woodland, or for farming purposes; but may be taxed whenever laid off and sold, or occupied as town lots less than one acre." By a subsequent act, passed the 20th of November, 1857, the foregoing *proviso* was repealed, "so far as to render all lands within the present limits of said corporation liable to railroad tax, should the same be voted and imposed by said corporation."

The bill alleges that complainant's lands, brought within the limits of the corporation by the act of 1854, are still held by him, in part "as woodland," and in part "for farming purposes"—not laid off, sold, or occupied as town lots. And the object of the bill is to enjoin the collection of the tax assessed upon this portion of his town property.

The charter of incorporation of the town of Chattanooga (act of 1851, ch. 13, sec. 15) provides that "the said corpo-

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ration shall have power to subscribe for stock in any railroad or turnpike road company, and pay for the same with its bonds or otherwise."

The complainant resists this tax mainly on two grounds: First, it is insisted that the act of 1857 is void. The argument assumes that the act of 1854, exempting the lands thereby included from "a corporation tax, while held as woodland or for farming purposes," having been assented to and accepted by the corporation as an amendment of its charter, was a *contract* between the corporation and the owners of the land thus included; that upon this condition of exemption from corporation tax, while held as woodland or for farming purposes, the lands were brought within the corporation; and the owners thereby became vested with a right to hold the same, until laid off and sold as town lots, exempt from a corporation tax for any purpose.

We are unable to assent to the correctness of this argument. This case is wholly unlike the case of *The State of New Jersey v. Wilson*, 7 Cranch, 164. There, in consideration of the surrender by the tribe of Delaware Indians of their claims to a large portion of territory in New Jersey, the government agreed to purchase a tract of land on which they might reside. An act of the Legislature was passed, in 1758, to give effect to this agreement, in which it was provided that the lands to be purchased for the Indians should not thereafter be subject to any tax. After residing on the lands thus purchased until 1801, the Indians obtained permission from the Legislature to sell the same, which was done. And, in 1804, the Legislature passed an act repealing the act of 1758, which exempted said lands from taxation. The Court held that the transaction between the Indians and the government of New Jersey was a contract founded on a valuable consideration given by the Indians; that the privilege of exemption from taxation was annexed to the land itself; and that the act of 1804 impaired the obligation of the contract, and consequently was void. This was unquestionably correct.

But the case under consideration is destitute of every ele-

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ment of a contract. The extension of the corporate limits of Chattanooga was an exercise of governmental power of which the persons newly taken in could not be heard to complain; they had no voice in the matter, no power to resist, nor was any legal right of theirs infringed thereby. The provision of the act exempting their lands for a time from a corporation tax was without any consideration moving from them, and purely gratuitous on the part of the Legislature; and, to say the least of it, was an invidious and improvident provision made in their favor.

It is unquestionably true that the government may surrender the power of taxation, in respect to particular lands, in favor of an individual; and it is no less true that the provision of the Constitution securing the inviolability of contracts extends as much to contracts with a State as to contracts between individuals. But the surrender of this, or any of the rightful powers of government, is not to be presumed; nor is the bestowal of a privilege, for a limited time, and without consideration, to be taken as obligatory on the Legislature in a case like the present.

The exemption contained in the act of 1854 was a privilege which the Legislature, in its discretion, might bestow, and which it might, at pleasure, take away, inasmuch as no private vested right was affected in the sense of the Constitution. The grant of the privilege, and its resumption, were alike discretionary matters of sovereignty.

The idea of a contract between the corporation and the owners of land, taken in by the act of 1854, has no foundation to rest on.

The other ground assumed is, that the "Will's Valley Railroad" is not a "corporation purpose" of the town of Chattanooga, in the sense of the Constitution. Art. 2, sec. 29. Upon this point a great deal might be said on both sides to but little profit. Every attempt to lay down an exact general rule, by which to determine what is "a corporation purpose," must prove nugatory. The question must, necessarily, be decided in view of the facts of each particular case. And while

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we do not mean to say that the judgment of the local government of the town is to be taken as conclusive of the question whether the object proposed be a legitimate corporation purpose, yet, we think it might, in general, be safely taken as *prima facie* evidence of the fact; for it will perhaps be found, in most cases, that an intelligent board of aldermen are more capable of forming a correct judgment, as to what measures are of a nature to promote, more or less directly, the general interests and prosperity of the town, than any other tribunal.

The force of the objection, in the present case, is placed upon the fact that the "Will's Valley Railroad" stops short, some six miles, of the town of Chattanooga. We are unable to see the force of this objection. If it be a matter of vital importance to the permanent interests of Chattanooga to have a direct communication opened up into the interior of Alabama and other portions of the South, by means of the "Will's Valley Railroad"—and this does not seem to be seriously questioned—how can it be regarded as a matter of any practical importance whether the trains of the latter company reach Chattanooga upon a road of their own, running parallel, for the distance of six miles, with the Nashville and Chattanooga Road, or upon the latter road? For anything that we can see, the advantages would be precisely the same. Therefore there is nothing in this objection. The appropriation of the money to the construction of a part of the road lying beyond the limits of Tennessee is not objected to in the argument here; nor could this be made a ground of valid objection, under the circumstances of this case. 1 Sneed, 667.

The objection that the proposition to subscribe for the stock was not submitted to a vote of the inhabitants of the town is not well founded. The Legislature was authorized by the Constitution to confer the power, directly and exclusively, upon the mayor and aldermen. Con., art. 2, sec. 29.

Upon the whole, we perceive no error in the decree of the Chancellor dismissing the bill, and it will be affirmed.

Daugherty and Wife v. H. C. Marcum et al.

ELISHA DAUGHERTY AND WIFE v. H. C. MARCUM et al.

1. **CONSTRUCTION.** *Deed reserving an occupancy during life.* If a deed is executed reserving an occupancy during life to the donor or bargainor, the entire estate passes, as between the parties to the deed. No right would remain in the donor or bargainor except, merely, the right to possess, and, perhaps, to enjoy the profits during life.
2. **EVIDENCE.** *Estoppel. Admissions.* All persons, being *ex juris*, are required to *speak out* when an assertion is made, or an act done, in their presence, or with knowledge on their part incompatible with their legal rights; and the failure to do so is taken as a tacit admission of the truth of the fact so asserted, or of the right of the person to do the act.
3. **SAME.** *Same. Same. As between relatives.* This principle applies as much between relatives as it does to strangers; and if a statement is made by a mother in reference to a conveyance made to a son, in the presence of the son, which is not controverted by him, such tacit admission has the same effect as if made to a stranger.

FROM SCOTT.

Verdict and judgment for the plaintiffs, GARDENHIRE, J., presiding. The defendants appealed.

HUMES and YOUNG, for the plaintiffs in error.

MALONE, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

It is clear, that by the deed of Ann Marcum to Hiram and George Marcum, of the first of May, 1845, the entire estate was conveyed, and passed to the latter, as between the parties, under the reservation, at the close of the deed, of an *occupancy during life*, nothing remained in the donor except merely the right to possess, and, perhaps, to enjoy the profits

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during her life. In this view, the subsequent levy and sale of the land, as the property of Ann Marcum, would pass no title to the freehold to the purchaser at the execution sale.

There is then but one hypothesis, (the question of estoppel aside for the present,) upon which it can be maintained that Lavinia Daugherty acquired any interest—so far as regards the lands embraced in the deed of gift from Ann Marcum to her two sons, Hiram and George Marcum—and that is, that said conveyance was fraudulent as against the creditors of the donor. This conclusion is plausibly supported by the evidence. The fact was asserted to be so by Ann Marcum, the donor, in the face of her son Hiram, and at least impliedly admitted by him to be true. Upon this point of the case, the law was not correctly stated by the Court in the instruction given to the jury. A distinction was made, based upon the relation of the parties, which is not well founded. The charge assumes, that if, when Mrs. Marcum assented, in conversation with Hiram, that the deed of gift was made to defraud her creditors, the latter remained silent, or replied as he did, from deference to his mother, and to avoid any altercation with her, then it would not amount to an admission, and would be no sufficient evidence of the existence of the alleged fraud. This part of the charge is exceptionable; it not only states the rule of law incorrectly, but decides upon the effect of the evidence.

We are aware of no such distinction as is here stated. All persons, being *sui juris*, are required to *speak out* when an assertion is made, or an act done in their presence, or with knowledge on their part, incompatible with their legal rights; and the failure to do so is taken as a tacit admission of the truth of the fact so asserted, or of the right of the person to do the act. This cogent principle applies as much between relatives as it does to strangers. The discrimination attempted is too refined for the practical purposes of society.

The effect claimed for the act of Hiram Marcum, at the time of the sheriff's sale, is much beyond what can properly be ascribed to it. It is not very apparent from this record

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what particular lands had been levied on as Ann Marcum's. It cannot well be supposed, however, that anything more was intended to be seized than the fifty and ten acre tracts, to which she formerly claimed title. It cannot be affirmed, upon the proof in this record, that the request of Hiram Marcum to Lavinia Daugherty, at the time of the sale, "not to let the land go," had reference to anything more than the supposed rights of Ann Marcum in the fifty and ten acre tracts; as to which, it may have been thought, on all hands, that she had such a right as was subject to seizure and sale, either under the reservation in the deed of gift, or on the ground that said deed was inoperative as against her creditors. And if Hiram Marcum could be held estopped at all by this act, the estoppel would have only this extent. It would be a strong construction to apply the principle of estoppel to lands which Lavinia Daugherty knew belonged to Hiram Marcum, by title acquired from the State, and, consequently, could not be supposed by any one to have been levied upon as the property of Ann Marcum; and if so levied on, every one must have known that the levy and sale would have been a nullity.

Judgment reversed.

CHARLES CAMPBELL v. JOHN CAMPBELL.

1. **SALE OF REAL ESTATE.** *Effect of sale by sheriff.* If land is sold at sheriff's sale, and no deed is executed by the sheriff to the purchaser, he is vested with nothing more than a mere equity; and the legal title remains in the debtor.
2. **SAME.** *Agreement—construction of.* In the construction of an agreement or conveyance, substance rather than form is to be regarded. And if a debtor, whose land has been sold at execution sale, executes an instrument of writing by which he sells and conveys to another, his right to redeem the land sold; and agrees when it is so redeemed,

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the same is bargained, sold and conveyed to such party; such instrument possesses all the indispensable requisites of a deed of bargain and sale, and its legal effect, although informal, is to invest the party to whom it is executed with a present title in fee simple.

3. **REDEMPTION.** *Effect of the purchaser's death. Administrators and executors.* Upon the death of the purchaser of real estate at execution sale, no conveyance having been made to him for the land by the sheriff, if the land is redeemed by the debtor or his assignee the redemption money would properly go to the personal representative; and constitute a fund in his hands for the payment of debts, and for distribution under the statute.
4. **SAME.** *Same. Same. Money to be paid to the personal representative.* This being so, upon the redemption of the land the money should be paid to the personal representative, and not to the heirs.
5. **SAME.** *Same. When title made to the purchaser.* If the purchaser had been vested with the legal title to the land, by a deed from the sheriff, it would be a conversion of the money bid for the land, into realty; and would go to the heir, in case of intestacy, and from him the redemption would have to be made.
6. **EJECTMENT.** *Equitable title.* In an action of ejectment, in a Court of Law, the legal title, only, can be looked to; and, in general, the plaintiff's recovery cannot be resisted on the ground of an outstanding equitable title, in a third person, or even in the defendant.
7. **EVIDENCE.** *Exceptions to. Practice.* If an objection to evidence be a formal rather than substantial one—to be available in the Supreme Court, it must have been specially taken in the Court below.
8. **SAME.** *Parol. Tax books.* In an action of ejectment, if the statute of limitations is relied on, it is competent to prove, by the tax books, in whose name the land was listed, as a circumstance proper to be looked to by the jury in determining the question, whether the defendant claimed to be the owner of the land. The record evidence must be produced: Parol evidence of the fact is not admissible.

FROM CLAIBORNE.

This cause was tried before Judge TURLY. Verdict and judgment for the plaintiffs. The defendant appealed.

EVANS & THOMAS, for the plaintiff in error.

NETHERLAND & HEISKELL, for the defendant in error.

Charles Campbell v. John Campbell.

McKINNEY, J., delivered the opinion of the Court.

This was an action of ejectment. The plaintiff recovered, and the defendant has brought the case here by an appeal in error.

It appears that George Campbell, father of the plaintiff and defendant, was the owner of three small tracts of land, adjoining each other, and forming one tract of perhaps 118 acres, lying in Claiborne county. The entire tract was levied on and sold at sheriff's sale, as the property of said George Campbell, on the 8th day of May, 1854, and was purchased by one William Fugate, for the sum of \$315.

On the 22d day of May, 1855, an instrument, under seal, was executed by and between the said George Campbell and his son Charles Campbell, the plaintiff in this action, which is called an "article of agreement." It recites the seizure and sale of said land by the sheriff, and purchase by Fugate. It likewise recites that said George Campbell "is unable to redeem said land;" and then proceeds as follows: "Now it is agreed between the said George Campbell and the said Charles Campbell, that the said George hereby sells and conveys unto the said Charles Campbell, the right to redeem the said land; and hereby agrees, that whenever the said Charles shall redeem the said land, that the same is hereby bargained, sold, and conveyed to the said Charles; and the said George hereby conveys to the said Charles, whatever personal property he now owns. To have and to hold the said land and personal property, to the said Charles Campbell, his heirs and assigns, forever."

The consideration of the conveyance is then stated, namely, that said Charles is bound to provide a comfortable support for said George Campbell and wife, during life. This instrument was proved and registered.

William Fugate, the purchaser of the land at execution sale, died without having received a conveyance from the sheriff for said land. And on the 8th of February, 1856, Charles Campbell paid to Woodson, the administrator of Fugate's

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estate, the full amount paid for the land by the latter, with interest thereon, in redemption of said land; and took from said administrator a full acquittance for the same.

John Campbell, the defendant in the action, had resided, for many years preceding the execution sale, on a part of said land, by the consent of his father, George Campbell, but without any written evidence of title or claim to the same; and to oust him of this possession, the present action was brought.

The first error assigned, is, that the instrument above mentioned was not operative to transfer the legal title from George to Charles Campbell. It is true, that inasmuch as no deed was executed by the sheriff to Fugate, the purchaser of the land, the latter was vested with nothing more than a mere equity, and the legal title remained in George Campbell; and if the legal title were not communicated to Charles Campbell by force of the instrument referred to, it is clear that he would not be entitled to recover. The instrument of conveyance is certainly informal; but we are to regard the substance rather than the form; and so viewing it, we are of opinion that it possesses all the indispensable requisites of a deed of bargain and sale; and that its legal effect was to transfer to the bargainee all the interest of the bargainor in said land; and to invest the former with a present title in *fee simple* to the same.

The next error assigned, is, that the redemption from the personal representative of Fugate, was a nullity—the equitable right of the intestate, acquired by the purchase, having, on his death, descended to his heirs at law.

This objection is not tenable. In the first place: In an action of ejectment, in a Court of Law, the legal title, only, can be looked to; and, in general, the plaintiff's recovery cannot be resisted on the ground of an outstanding *equitable title* in a third person, or even in the defendant. But, in the next place, the land having been sold, and purchased by Fugate, in satisfaction of a debt due to him from George Campbell, and no conveyance having been made to him for the land, by the sheriff, it is clear, that upon a redemption of the land, by

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the debtor, or his assignee, the redemption money would properly go to the administrator, and constitute a fund in his hands for the payment of debts, and for distribution, under the statute. And if this be so, it would seem to follow as a matter of course, that the redemption from the administrator was regular. The correctness of this conclusion is to be tested by the question—who was entitled to receive the redemption money in this case? If not the heir at law, how could he assent to, or suffer a redemption? It would be otherwise, if, by the execution of a sheriff's deed to the purchaser, he had become vested with the legal title to the land; which, on his death, intestate, would have descended to the heir. This would be a conversion of the money bid for the land, into realty; and impressed with that character, it would go to the heir; and, of course, from him, the redemption must be effected.

It is further insisted, that the Court erred in permitting the clerk of the County Court to testify, that he had examined the tax books in his office, for a number of years preceding the commencement of this suit; from which it appeared that the lands in dispute had been given in for taxes by George Campbell, and never by the defendant, John Campbell. A *general* exception was taken to this evidence, but the record does not show the ground of objection; whether because parol evidence of the fact was admitted, which is the ground here insisted on; or, because the fact, if proved by the production of the books, was, in itself, irrelevant or inadmissible. The inference, from the reading of the exception, would be, that the latter was the ground relied on in the Court below.

In view of the statute of limitations, which was relied on by the defendant, the fact proved by the clerk was admissible, as a circumstance proper to be looked to by the jury in determining the question, whether George Campbell, or the defendant, claimed to be owner of the land. The objection to parol evidence of the fact would have been valid, if properly taken; still, it was a formal, rather than a substantial ground of exception, and to have been available in this Court, must have been specially taken. It does not affect the merits of

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the case; and as it might have been waived well enough, we must take it that it was waived—the contrary not appearing.

The objection, that it does not appear from the record that Woodson was administrator of Fugate's estate, is not well founded.

We think there is no available error in the record, and the judgment will be affirmed.

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J. L. MYERS *et al.* v. THE BANK OF TENNESSEE.

1. **BILLS AND NOTES.** *Notice of dishonor. Endorser.* No particular form of notice to an endorser is required by law. The notice, if it is sufficient to put the endorser upon inquiry and to prepare to pay the note, and the jury is satisfied it refers to the note in suit, and no other note is shown to have been endorsed, to which it could refer, will bind the endorser.
2. **SAME.** *Same. Same.* *The question as to notice must be left to the jury* The question as to the identity of the note mentioned in the notice, with the note sued on; and, also, the question whether, notwithstanding the mistake, the endorser had substantial notice as to what note it was intended to fix his liability upon, by the notarial protest, are to be left to the jury.

FROM SCOTT.

Tried before Judge GARDENHIRE. Verdict and judgment for the plaintiff. The defendants appealed.

SCOTT, for the plaintiffs in error.

HUMES, for the defendants in error.

WRIGHT, J., delivered the opinion of the Court.

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The protest and notice, in this case, are sufficient to charge the endorsers, and were properly allowed to go to the jury. The only variance between them and the note sued on, is in the name of the last endorser; J. G. Shubert being the last endorser on the note, and F. Z. Kimbresh being, by mistake, described as the last endorser in the protest and notice. In all other respects they agree: in the date and amount of the note—time and place of payment—and the names of the makers and two first endorsers. There was no other note to which the protest and notice could apply. The identity of the note described, with that sued on, could not be mistaken. It was, in truth, made out in the defendant's proof. The law does not prescribe any form of notice to an endorser. It was sufficient to put the defendants on inquiry, and prepare them to pay the note, or defend. It is enough if the jury are satisfied that the notice refers to the same note in suit, and was so understood by the defendants. It was incumbent on them to show some uncertainty in the notice tending to mislead them; as other notes endorsed by them under similar circumstances. *Rudy v. Seixos*, 2 Johns. Cases, 387; 2 Greenl. Ev., sec. 189.

But the Circuit Judge erred in not leaving to the jury the question as to the identity of the note mentioned in the notice with that sued on; and, also, the question whether, notwithstanding the mistake, the plaintiffs in error had substantial notice as to what security it was intended to fix their liability by the notarial protest actually furnished them. *Ross et al. v. The Planters' Bank*, 5. Hum., 335.

But this error does not go to the merits, and could not have injured the plaintiffs in error, as it is clear they had, under a proper charge, no valid defence. We, therefore, cannot reverse for it. *Neddy et al. v. The State's Lessee*, 8 Yer., 249; *Rosson v. Hancock*, 3 Sneed, 434.

Affirm the judgment.

C. H. Mills & Co. v. W. C. Haines and others.

C. H. MILLS & Co. v. W. C. HAINES AND OTHERS.

1. **DEED OF TRUST. *Fraud. Beneficiaries and creditors.*** In a contest between creditors and the beneficiaries in a deed of trust, fraud on the part of the maker of the deed, will not deprive the beneficiaries of the security provided for them in the conveyance, unless they have participated in the fraud.
2. **SAME. *Trustee. Act of 1855-6.*** It is a familiar principle of equity, that a trust shall never fail for want of a trustee, or by reason of his neglect, or default. And, therefore, a failure of the trustee to comply with the terms of the act of 1855-6, will not impair the validity of the deed. It would furnish a sufficient reason for displacing him, and appointing another, but would not defeat the trust.
3. **SAME. *Acceptance by the beneficiaries. Lien.*** The creditors for whose benefit a deed of trust is made, do not acquire a lien, or become vested with any absolute right under it until they have accepted the provisions made for them.
4. **SAME. *Same. Same. Presumption of acceptance. Attaching creditors.*** In the absence of proof to the contrary, the assent to and acceptance of a deed by the beneficiaries will be presumed. But this presumption will not suffice in a contest, as to priority of liens, between the beneficiaries in the deed and other lien creditors. And if the property conveyed be impounded by other creditors before there is an acceptance of the provisions of the deed by the beneficiaries, they will have priority of lien.
5. **SAME. *Revocation of a deed of trust.*** If the creditors for whose benefit a deed of trust is made be not privy to the conveyance, and the fact of the existence of such conveyance has not been communicated to them, the deed operates merely as a power to the trustee; and it may be revoked by the maker of the deed, at any time before notice of its execution, to them, and their acceptance of its provisions.

FROM BRADLEY.

This cause was heard at the August Term, 1859, before Chancellor VAN DYKE, who pronounced a decree for the complainants. The defendants appealed.

C. H. Mills & Co. v. W. C. Haines and others.

J. H. GUAT, for the complainants.

JARNAGIN, CALDWELL, HOYLE, and WELOKER & KEY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainants are judgment creditors of the defendant, William C. Haines; and having exhausted their legal remedy, they filed this bill, on the 23d of March, 1857, in the Chancery Court at Cleveland, to set aside an alleged fraudulent conveyance made by said William C. Haines to his father, Sam'l B. Haines, as trustee, of a stock of goods owned and possessed by the former, at his store in Cleveland.

The conveyance was made shortly before the filing of the bill, namely, on the 10th of March, 1857.

The deed of trust, upon its face, purports to be for the exclusive benefit of various creditors named therein, to whom the said William C. Haines was indebted. The several debts provided for, are specifically stated in the deed, and it seems that they are mostly evidenced by notes, made by said William C., and indorsed by Samuel B. Haines. The deed provides that if the several enumerated debts to which preference is given in the deed, should not be satisfied by William C. Haines, by the 1st of December, 1857, the trustee, said Sam'l B. Haines, should proceed to sell said stock of goods at public auction, after fifteen days' notice; and it is further provided that from the time of the execution of said deed of trust, the trustee should proceed to sell such goods at wholesale or retail, for cash, and apply the proceeds, as he received them, to the satisfaction of the several enumerated debts; and, in the event there should be a surplus, it is provided that it shall be applied to the payment of two notes for about seventeen hundred dollars, made by said William C., and indorsed by Sam'l B. Haines, and due to W. T. Dupree, of Philadelphia.

The beneficiaries in said deed of trust are all made defendants to the bill, and most of them have answered.

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An amended bill was filed, charging that said William C. and Samuel B. Haines were partners, and joint owners of said goods. This is denied, and is not proved.

The validity of the deed of trust is impeached; first, on the ground that it was a fraudulent contrivance between William C. and Samuel B. Haines, to defraud the complainants; and, secondly, because Samuel B. Haines, the trustee, had entered upon, and was proceeding in the execution of the trust, without having taken the oath, or giving bond and security, as required by the act of 1855-6, ch. 118, secs. 9, 10. As respects the first ground, it may be observed, that there is no evidence of any such actual or meditated fraud, against the complainants, as would, of itself, under all the circumstances, be sufficient to affect the validity of the deed. The evidence relied on is merely circumstantial. There is, it is true, in the contract of William C. and Samuel B. Haines, a good deal to excite suspicion. Samuel B. Haines was much embarrassed, and regarded as insolvent for a long period before the execution of the deed of trust. His son, William C., was a young man of very small means, and though he was held out as owner of the establishment, and his father but a clerk or agent, in his employ, we are led to the conclusion, from all the circumstances, that the father was really the owner, and that the ostensible ownership of the son, was a subterfuge to protect the goods from the father's creditors.

But taking this to be so, we are at a loss to perceive, if there were nothing more in the case, how the conveyances could, upon that ground, be held invalid, as respects the beneficiaries. They are creditors of both the son and father, their debts are just and *bona fide*; they had no participation in the making of the deed, or in the alleged fraud of the maker and trustee, if fraud exists on their part. Though there may have been, in the general arrangement between the father and son, as to the manner of conducting the business, a fraudulent purpose, as against the creditors of the father, yet this cannot be held to have incorporated itself with, or to affect the security or preference provided by the deed of trust for the beneficiaries.

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We are by no means prepared to say, that the latter, who are innocent of any participation in the alleged frauds, supposing it were established, should, for that reason, be deprived of the security and preference provided for them in the deed of trust. They, certainly, have equal equity with the complainants; and, therefore, should be allowed to retain the advantage of a security acquired without blame on their part, and of which, in good conscience, they may well claim the benefit.

It matters not in this case, whether the goods belonged, in truth, to the father or son, as both were liable to the beneficiaries. The complainants, as well as the beneficiaries, were all, ostensibly, the creditors of William C. Haines, in whose name the business was conducted. If, however, in view of the law, the goods were the property of the father, this fact would not make the case better for the complainants, nor in any way affect its determination.

The second ground assumed by complainants, is not tenable. The failure of the trustee to comply with the requirements of the act of 1855-6, furnishes a sufficient reason for displacing him, and appointing another person in his stead to execute the trust, as provided in sec. 11 of the act. But we are aware of no principle upon which the legal operation and validity of the trust would be impaired for that reason, in the absence of any fraudulent complicity on the part of the beneficiaries, with a view to the prejudice of other creditors of the maker of the deed. It is a familiar principle in equity, that a trust shall never fail for want of a trustee, or by reason of his neglect or default. A Court of Equity will, in such cases, protect the interest of the beneficiaries, and execute the trust. The only ground, then, upon which the right of the beneficiaries can be defeated, is one not assumed distinctly in the but which arises upon the proof, and it is this: there is no evidence of an acceptance of the trust, by the beneficiaries, prior to the impounding of the goods, upon the process issued in pursuance of the prayer of complainant's bill.

It is clear that the creditors for whose benefit a deed of trust may be made, do not, merely by force of the execution

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of the deed, acquire a lien, or become vested with any absolute right under such deed. It is at their option either to accept or repudiate the trust; to make themselves parties to the assignment made for their benefit, or to refuse to do so. Hence it results, that until after the creditors shall have accepted, by claiming or taking a benefit under such assignment, or, by some distinct act, manifesting an intention to do so, no lien can be held to exist in their favor. It is true, that the trust, being for the benefit of the creditors provided for, their assent to, and acceptance of the trust may be presumed, in general, where the contrary does not appear. But this presumption, alone, will not suffice in a contest as to priority of liens, between the beneficiaries in the deed and other lien creditors. 10 Hum., 371, 376.

If the creditors for whose benefit the deed of trust is made, be not privy to the conveyance, and the fact of the existence of such conveyance has not been communicated to them, the deed operates merely as a power to the trustee; and it may be revoked by the maker of the deed. See *Acton v. Woodgate*, 8 Cond. Eng. Ch. Rep., 99; *Galt v. Dibrell*, 10 Yer., 147, 158.

If, then, before notice of the execution of the deed of trust, to the creditors provided for, and their acceptance of it, the debtor may revoke the conveyance, much more may other creditors, under such circumstances, attach the property; and in this, or in other modes, acquire a valid lien upon the same.

On this latter ground, the decree of the Chancellor, in this cause, will be affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE: DECEMBER TERM, 1859.

E. H. TALMADGE *et al.* v. THE NORTH AMERICAN COAL
AND TRANSPORTATION COMPANY.

1. CORPORATION. *Powers are controlled by its charter. Foreign corporation.* A corporation may sue or be sued, or make contracts in other States, or in reference to property there situated, as well as in the State of its creation, if its charter confers such power. Whenever a corporation makes a contract, it is the contract of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim, are the rights given to it in its charter, and not the rights which belong to its members as citizens of a State.
2. SAME. *Same. Same. By whom its contracts to be made, or acts done.* A corporation is what the incorporating act has made it, and it can do no acts either within or without the State which creates it, except such as are authorized by its charter; and those acts must, also, be done by the officers or agents, and in such manner as the charter authorizes.
3. SAME. *Same. Effect of limitation in the charter of a foreign corporation. Mortgage.* A foreign corporation can claim no legal existence in this State, except in the recognition, by our Courts, of the charter granted to it by the State in which it exists; and if there is any prohibition in said charter against mortgaging the real and personal estate of the corporation, there is nothing in the policy of our law that would authorize the Courts to relieve it of that restriction.

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4. **SAME.** *Rule as to construction of charters.* A grant of privileges, by the State, to persons as a body corporate, must be construed in favor of the public and against the grantees; and a prohibition, reservation, or exception in the charter of a corporation will stand in full force, though it destroy or make nugatory all the powers given to the company.
5. **CONFLICT OF LAWS.** *Effect to be given to the laws of another State.* Effect will be given to the laws of another State whenever the rights of a litigant before our tribunals are derived from, or are dependent on those laws; and when such recognition is not prejudicial to our interests or the rights of our citizens.

FROM WHITE.

This cause was heard at the September Term, 1859, before Chancellor VAN DYKE.

HAWKINS, SAVAGE, and MURRAY, for the complainants.

M. M. BRIEN and COLMS, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is a contest among several creditors of the North American Coal and Transportation Company, as to which shall have priority of lien upon certain lands of this company, situated in the State of Tennessee, and chiefly, if not entirely, in White county.

The North American Coal and Transportation Company is a non-resident corporation, and Elijah H. Talmadge and Henry L. Stevenson are, severally, its creditors, and have filed bills against it as such in the Chancery Court at Sparta, and caused these lands to be attached. Samuel Newman is also a creditor of said corporation, and claims a lien upon said lands under and by virtue of four several mortgages, executed upon said lands by the said corporation to one Charles Newman, of a date prior to said attachment bills. These mortgages, with the mortgage debts, were assigned by

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said Charles to Samuel Newman, and, as such assignee, he brings his bill to have satisfaction of his debts out of said lands. It is not contended, and could not be, that he stands upon any higher ground than Charles Newman, his assignor. If the mortgages be invalid or void in the hands of the latter, they are necessarily so in his hands. They appear to have been executed in the State of New York, and there duly acknowledged, and registered in White county, Tennessee; all of which being done previous to the filing of the attachment bills, gives the mortgages the prior equity unless they be void. This, it is insisted they are, by Talmadge and Stevenson, upon the ground that said corporation had no authority to make them, and was, in fact, prohibited from so doing; and that, therefore, they created no lien whatever.

The solution of this question depends upon the power of this corporation under its charter. It was organized in the State of New York, under and by virtue of the general and public corporation laws thereof, and having its principal place of business in the city of New York; but by the terms of its charter, its operations might be carried on not only in the city and county of New York, but anywhere within the United States. Its certificate of incorporation, or document, showing who the original corporators were, the object and purposes of the corporation, and what were the statutes under and by virtue of which they were enabled to become, and did become a corporation, was filed in the county clerk's office of the county of New York, on the 28th of April, 1855, and afterwards a duplicate thereof filed with the Secretary of State; and from thence they became and were a corporation by the name and title of the North American Coal and Transportation Company, organized under two statutes—the first dated February 17th, 1848, and the second dated June 7th, 1853.

The object of said corporation, as stated in the certificate, was to mine, or cause to be mined, and to purchase either anthracite or bituminous coal, or both; to sell, vend, or dispose of the same; to either lease or purchase, or both, coal and other mines, or mining lands, and such real and personal

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property and equipments to transport coal and other freight, by canal or otherwise, as might be deemed by the trustees to be advantageous to the company. The act of the 7th of June, 1853, merely enables the company to pay for lands and other property in its stock instead of money. It provides that the trustees of the company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls; neither shall the holders thereof be liable to any further payments.

The act of the 17th February, 1848, is the chief charter of the company, giving it most of the powers, faculties, and capacities it possesses. The last clause of the second section of this act declares, "They shall, by their corporate name, be capable of purchasing, holding, and conveying any real and personal estate whatever which may be necessary to enable said company to carry on their operations named in such certificate, *but shall not mortgage the same, or give any lien thereon.*"

It is conceded, in the pleadings, that the title to the lands in controversy is in this corporation; and it is not denied but that they were acquired for the legitimate business purposes of the company under its charter, and there is nothing to show they were not.

The Chancellor held these mortgages valid. In this we think he erred. This corporation is expressly prohibited, in its charter, from giving any mortgage, or lien of any kind, upon its real or personal estate, and therefore wanted the capacity to make any such contracts. From the principles announced by the Supreme Court of the United States in the *Bank of Augusta v. Earle*, and the other cases reported in 13 Pet., 519, it will be seen that though a corporation may sue or be sued, or make contracts in other States, or in reference to property there situated, as well as in the State of its creation, yet it has no capacity for any of these things, unless *enabled* to do so by its charter, and certainly cannot

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act wherein it is restrained or prohibited, any more than if it had never been incorporated. It is immaterial where it may have obtained its charter, or that the property with which it undertakes to deal may be within another jurisdiction. Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim, are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State. It is precisely what the incorporating act has made it, and derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes. It may be safely assumed that a corporation can make no contracts, and do no acts either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done by the officers or agents, and in such manner as the charter authorizes.

We have no law or statute in our State relieving this corporation from the prohibition, or *enabling* it to mortgage its real estate situated here. It cannot even claim a legal existence, save in the recognition by our Courts of the charter granted to it by the State of New York; and that charter is fatally destructive of these mortgages. Neither are we aware of any policy which requires that we should give them effect. It is as much the law of this State, and to the interest of its citizens, as of New York, that corporations shall be kept within their charters. To be sure, the incidental common law authority existing in most of the States, whereby corporations are enabled to execute mortgages to secure their debts, and to create preferences among their creditors, has not been repressed here, as in New York. But this difference does not, as we conceive, prevent us from extending to that State the usual comity of recognizing its law. The cases of contracts made in a foreign country—to use the language of Judge Taney—are familiar examples. It is established as a principle of international jurisprudence, that effect should be given to the laws of another State, whenever the rights of a litigant

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before our tribunals are derived from, or are dependent on those laws, and when such recognition is not prejudicial to our own interests, or the rights of our own citizens. Judge Story, in his *Conflict of Laws*, sec. 88, says :

“In the absence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of Justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests.”

The foreign law, for the purpose of the decision of the particular case, becomes our law by our own voluntary adoption and consent. Not that the laws of a country have any binding force beyond its own territorial limit ; or that the authority of a foreign law is admitted with us *ex proprio vigore*, but only *ex comitate*. And if prejudicial to ourselves, or our citizens—of which we must be the exclusive judges—we are under no obligation to give it effect. But in cases not so prejudicial, a spirit of comity, and a sense of mutual utility, ought to induce us to allow full force and effect to the foreign law. Story's *Con. Laws*, sec. 98.

Undoubtedly, notwithstanding the New York prohibition, Tennessee might declare, as to real estate within her limits, that mortgages might be made and preferences given by this corporation. And if, by any law, or policy of our State, a failing or insolvent corporation were denied the power of making preferences among its creditors, it would be a question whether a foreign corporation, created in a State allowing such preferences, or where the charter gave the authority, should, as to property here, be allowed any such power, to the prejudice of our own citizens.

This corporation, as to the power claimed for it to execute these mortgages, stands upon a very different footing from a natural person. The former exists and acts, only by and through its charter. The power of alienation in the latter is not derived from any grant, but rests upon general principles of law, and of right. Many disabilities might be imposed by the laws of a foreign government, or State, upon its subjects

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or citizens, which our Courts would deem purely local and incapable of being enforced here, when sought to be applied to transactions or property within our jurisdiction. Story's Con. Laws, secs. 87, 91, 92. And it may be that the restriction in the charter of a foreign corporation might be of such a nature as to make it the duty of our Courts to disregard it, giving effect to the residue of the charter. But it is sufficient here to say that we do not deem the prohibition contained in this charter to be of that character.

That a corporation may lawfully be restrained in its charter from the execution of mortgages upon its property, there can be no doubt. In the case of *The Commonwealth v. Erie and North East R. R. Co.*, 27 Penn. R., 855, the rule laid down by Judge Black, in delivering the opinion of the Court, is, that in a private deed, an exception as large as the grant is void, because private deeds are construed most strongly against the grantor. But a grant of privileges by the State, to a body of adventurers, must be construed precisely the other way—in favor of the public and against the grantees. A prohibition, reservation, or exception in a charter, must, therefore, stand in full force, though it destroy or make nugatory all the powers given to a company. That it may be so restrained, is also laid down in Angell and Ames on Corporations, and numerous other authorities. Ang. and Ames, 153, 154, 155, (8d Ed.); *Charles River Bridge v. Warren Bridge, et al.*, 11 Pet., 420, 544 to 558.

And those who purchase lands, or take mortgages of it, are bound, at their peril, to take notice of these restrictions. Ang. and Ames, 155.

But, it is said, conceding all this to be so, still, that inasmuch as Charles Newman originally conveyed these lands to this corporation—for which it never paid him—and the bonds secured in these mortgages being given for that purchase money, the implied lien given by law to the vendor may be enforced. To this there are two answers; first: Charles Newman having unconditionally conveyed the land, the lien is personal to him, and does not pass by the assignment of the

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debt to Samuel Newman; and if the lien were not suspended by the assignment, Charles Newman is no party to this suit. Secondly: if this were not so, the *conveyance* having invested the corporation with the legal title, the lien cannot be set up against the creditors of the vendee. 2 Meigs' Dig. 921, 922.

And there is still another answer. We are reasonably satisfied that the mortgage bonds are not for the original purchase money to Charles Newman; but that, on the contrary, this company was based upon these bonds, and issued stock to Charles Newman in payment for his interest in the same, under the act of the 7th of June, 1858; and that this stock, with other rights claimed by Charles Newman, were subsequently surrendered to the company, and the mortgage bonds and mortgages executed in consideration of the surrender.

The decree of the Chancellor will be reversed, and priority given the attaching creditors in the order of their levies.

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JUSTICE OF THE PEACE. *Equity jurisdiction. Code, § 4124. Interest.*

If a party tender the purchase money for a tract of land, and demand a deed in pursuance of the contract—but the vendor is unable, at the time, to make the title, and, therefore, does not receive the money—he cannot charge the vendee with interest from the date of the tender until the title is made. The amount being under fifty dollars, the justice of the peace or court trying the cause can hear and determine it upon principles of equity; and a court of equity would not tolerate such a demand.

FROM WHITE.

This cause was heard before Judge FITE, at the January Term, 1859. The plaintiff appealed.

Harrel Williams v. Reuben Willhite.

SAMUEL TURNER, for the plaintiff.

COLMS, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt, commenced before a justice. The ground of the action is as follows:

Williams sold to Willhite a piece of land lying in White county, for the consideration of \$400, and executed a bond for title, binding himself to convey the same on payment of the last instalment of the purchase money.

Willhite paid \$100 down, and executed his bill single for the remaining \$300, payable on the 1st of January, 1856. At the maturity of the note, Willhite offered Williams the money in discharge thereof, and demanded a conveyance for the land; but the latter replied that he could not then make a title, as the title was still in one Mason. Afterwards, Williams procured a conveyance to be made from Mason to Willhite; and, thereupon, the latter paid Williams \$300, the principal of said note, for which a credit was entered, dated 5th of January, 1857. Afterwards, on the 25th of July, 1857, this suit was commenced on the note, to recover the interest which had accrued thereon from the time of its maturity. The facts were agreed upon, and submitted to the determination of the Court; and judgment was rendered against the plaintiff.

We think the judgment is correct. By sec. 4124 of the Code, it is provided, that "Any justice of the peace, and any Court of this State, before whom any cause may be pending, by appeal or otherwise, where the subject matter does not exceed fifty dollars, shall hear and determine such cause upon principles of equity, and render such judgment or decree as the merits of the case may require, as fully, and in the same manner, as Courts of Chancery."

Whatever objection might have been urged against the judgment, on common law principles, is entirely obviated by this provision of the Code. It would be most inequitable to

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permit the plaintiff to exact *interest*, after an offer to pay the money when it fell due, on his complying with the condition of his bond, which he then failed to do: a Court of Equity would not tolerate such a demand.

Judgment affirmed.

R. S. HOLLINS & Co. v. H. D. JOHNSON.

1. CERTIORARI AND SUPERSEDEAS. *Office of the writs. Confined to the grounds stated in the petition. Stayor.* In applications for writs of certiorari and supersedeas by a stayor, to bring up and quash an execution against him, the grounds presented and relied on in the petition, unless for sufficient cause the same is amended, and no others, are open for investigation.
2. JUDGMENT. *May be rendered on the justice's docket.* It is not essential that a judgment rendered by a justice of the peace should be written on the warrant. It is sufficient, and the judgment is valid, if written upon the docket of the justice rendering the judgment.

FROM OVERTON.

Verdict and judgment in favor of the stayor, at the January Term, 1859, GARDENHIRE, J., presiding. The plaintiffs appealed.

M. M. BRIEN and JONES, for the plaintiffs.

GOODPASTURE and HILDRETH, for the stayor.

CARUTHERS, J., delivered the opinion of the Court.

On the 3d of August, 1857, a judgment was rendered by A. M. Garrett, a justice of the peace for Overton county, in

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favor of R. S. Hollins & Co., against R. S. Windle & S. M. Keeton, for \$480.93. This judgment was entered upon his docket, but not on the warrant, or any other paper. Upon the written order of H. D. Johnson, dated on the 4th of August, 1857, he entered his name as stayor upon his docket. The execution issued upon this judgment against the defendants, and Johnson, as stayor, on the 12th of May, 1858, and levied on the 31st of the same month upon five mules of Johnson, was superseded, upon his petition, on the same day.

The case was submitted to a jury, who, as the record states, "rendered a judgment for the defendant." This is all that is stated as to the action of the jury, and there is nothing said as to what judgment was rendered by the Court upon it. The plaintiffs, however, "moved the Court for a new trial, and in arrest of judgment," which were refused, and an appeal in error by the plaintiffs.

Without regard to these informalities and imperfections, or any questions that might be made upon them, we will dispose of the case on the grounds upon which the rights of the parties must depend. The questions in this kind of cases are for the Court, and if he calls upon a jury to pass upon them, it is only to aid him in arriving at conclusions. In cases of this description, the object of the *certiorari* is not to obtain a new trial upon the merits, but to supersede the execution upon other grounds. In the former case, the office of the *certiorari* is only to bring up the case for a new trial, as if an appeal had been taken. For that reason good cause must be shown for failing to resort to the ordinary remedy by appeal, in addition to merits. But here, the object of the petitioner is to supersede and quash the execution for causes connected with the merits; the grounds pursued in the petition, and no others, are open for investigation. The petitioner points out such grounds of objection as he chooses to rely upon, and all else is, by implication, admitted to be right, or other objections which might be made, are waived or abandoned. Let this case illustrate the principle. The petitioner is proceeded against as stayor. He says he is not bound, be-

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cause there was no judgment against his principals, and that is indispensable to make him liable as stayor. He does not see proper to object to the sufficiency of his order to the magistrate to render him liable. He is not bound to avail himself of that objection, though it may exist, but may, if he chooses, waive it. If the ground upon which he places his case in his own petition, should fail him, on the investigation, he will not be allowed to pass out of his petition, and stand upon some other objection, of which his petition gives no notice. In a proper case, he might be allowed to amend. But where that is not done, he must be confined to the case made in his petition.

The single ground in this case, upon which the defendant succeeded, as we presume, is stated in the short but clear and pointed instructions given by the Court to the jury. He charged, "that the order for stay read is insufficient to bind Johnson, and it is not sufficient to render the judgment against him valid." There was, of course, nothing left for the jury to decide. But that is not material, if the position assumed by the Judge is correct, and upon the question before the Court.

But that was not the point made in the petition. No objection was made to the authority upon which his name was entered as stayor. The ground stated and relied upon is, "that there is no such judgment as that (of *Hollins & Co. v. Windle & Keeton*) to be found, as he is informed and believes, before Garrett, or any other justice. He states, that Hollins and others did sue Windle & Keeton before Garrett, for some amount—the warrant was returned for trial before Garrett—but no judgment was entered, as he is informed and believes, *on the warrant*, or written out." This shows very clearly that the idea upon which the petition was filed, was, that a judgment was not valid unless written upon the warrant. We have held that this is not necessary, but it is sufficient to enter it upon the docket of the justice. That is proved to have been the case in this instance. The petition clearly shows that he considered himself bound as stayor if there was a

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good and valid judgment against the principals, Windle & Keeton. At all events, he makes no other objection to his liability, and that being against him, he must be held bound, although there may be other valid objections that he might have taken to the proceedings.

In the case of *McDowell v. Turney*, 5 Sneed, 228, it is said that, "the office of the petitioner is to bring to the notice of the Court the grounds upon which the party seeks relief from the judgment or execution complained of."

It will not do to permit stayors to escape upon formal and unsubstantial grounds, after having delayed the judgment creditor until his debtors fail, and thereby cause the loss of honest debts that could otherwise have been collected.

Upon the whole, we are of opinion that the only ground upon which the petitioner could rely before the Court, was against him, and the judgment below should have been in favor of the plaintiffs, and the petition dismissed.

We, therefore, reverse the judgment, and order the *superseas* to be discharged, and judgment rendered here against the petitioner and his sureties.

MITCHELL PERRY, ADMR., &c. v. WINSTON HIGH et al.

1. WILL. *Construction. Issue of female slaves.* No right to slaves bequeathed in a will vests in the legatees until the death of the testator; and the children of such slaves, born after the execution of the will, but before the testator's death, do not pass under the will to the legatees owning their mothers, but remain the property of the estate.
2. SAME. *Same. Residuary clause.* If, after the general words, "all the remainder of property," in the residuary clause of a will, there is an enumeration of the property given, this enumeration qualifies the force of the general words, and restricts the residuary clause to the things specified.

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8. **ADVANCEMENTS.** *Legacies to be accounted for.* If a testator die intestate as to part of his estate, and his next of kin wish to share any part of the same, they are required to account for any advancements made them, by him, either in his lifetime, or by his will.

FROM SMITH.

Appeal from the decree of Chancellor RIDLEY.

FITE, GUILD, and MOORES, for the complainant.

HEAD & TURNER, McLAIN, and STOKES, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

1. The Chancellor decreed that the children, or increase of the female slaves of the testator, born after the execution of his will, and before his death, did not go to the respective legatees, or donees of the mothers, under the will. In this opinion we concur. As the will did not begin to operate until the death of the testator, no right to the female slaves, the mothers, vested in the legatees till that time; they remained the property of the testator, who was entitled to all the profits arising from them; and, consequently, their children, the negroes in question, were the property of the testator at his death. They are not enumerated, or in any way referred to in the will. *Jones v. Jones et al.*, Con. R., 310; *Cole et al. v. Cole*, 1 Ird., 460; 2 Ird. Eq. R., 245, 538; 3 Ird. Eq. R., 581.

This question must be settled by the true import of the will itself; extrinsic evidence, as to the meaning of the language employed by the testator, being inadmissible.

2. The Chancellor also held, that as to these slaves, so born between the execution of the will and the testator's death, they did not pass under the residuary clause of the will; but as to them he died intestate, and that they were distributable amongst his next of kin. In this opinion we also concur.

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The residuary clause is as follows: "All the remainder of property, consisting of money, notes, accounts, stock of every kind, crop on hand, or growing, farming utensils of every kind, after satisfying the demands hereinbefore provided, I will and bequeath to my aforesaid nephews, Mitchell Perry and James T. High, to be equally divided between them." The *demands* hereinbefore provided for, as used in the above clause, refer to the testator's debts, funeral expenses, and the cost of administering his estate, for the payment of which he had made provision, in the first clause of his will, out of the very things enumerated in the residuary clause. Now it is obvious, that this residuary clause does not refer to, or carry the slaves of the testator in any way. As authorities decisive of the question, we need only cite *Clark v. Hyman et al.*, 1 Dev., 382; *Frazer v. Alexander et al.*, 2 Dev. Eq. R., 348; *Simms et al. v. Garrett et al.*, 1 Dev. & Batt. Eq. R., 393. There is nothing in *Jarnagin v. Conway*, 2 Hum., 50-53, against this. It is true, the words, "all the remainder of property," unless qualified by something else, would carry every thing not previously disposed of. But here, after these general words, the testator gives a precise description of the specific things given, and of all of them, to-wit, *consisting of money, notes, accounts, stock of every kind, crop on hand, or growing, and farming utensils of every kind.* This enumeration qualifies the force of the general words, and restricts the residuary clause to the very things specified.

8. So, in like manner, the testator died intestate as to the slaves Giles and Mary, and stock in the Carthage and Harts-ville Turnpike Company, acquired by him after the making of his will, the same not being embraced by the residuary clause thereof. And so, also, in regard to the watch and gun; they are undisposed of in the will, and the Chancellor decreed properly as to all of them. *Davis et al. v. King et al.*, 2 Ird. Eq. R., 203.

4. The decree should be so drawn as to require such of the next of kin of the testator as may wish to come into his undisposed of estate, to account for any advancements made

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them, by him, either in his lifetime, or by his will. The decree is silent as to this, and we take it for granted the Chancellor meant to have the *intestate property* so distributed.

The decree of the Chancellor, with this modification, is affirmed.

S. D. MORGAN & CO. v. PERMENIUS COLEMAN.

STAYOR. *Justice of the peace. Where stay may be taken.* The office of a justice of the peace is the place where he performs the official act of rendering judgment; and if he accept a person as stay security at such place, although it may not be his ordinary place of transacting his official business, the liability of the stayor is fixed.

FROM OVERTON.

Verdict and judgment in favor of the stayor, at the May Term, 1859, GARDENHIRE, J., presiding. The plaintiffs appealed.

SWOPE, for the plaintiffs.

GOODPASTURE, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

On the 2d of November, 1857, a warrant was issued by R. N. Coffee, a justice of the peace for Overton county, in favor of S. D. Morgan & Co. against Windle & Keeton.

On the next day they acknowledged service, and agreed in writing that judgment might be entered against them by the justice for \$856.74. The justice accepted the confession in

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the law office of Attorney Swope, in Livingston, the county seat of Overton. This was some fourteen miles from his residence, at which he ordinarily transacted his official business, and kept his docket and other papers. But he received these papers and accepted the confession in this case as aforesaid, but did not enter the judgment until he returned home. As the parties stepped out of the office of Mr. Swope upon the pavement, they met Coleman, who, upon application of the defendants, and after some persuasion by them, consented to become their stayor, and was accepted by the justice, who entered his name as such upon his docket, on his return home, at the same time he entered the judgment by confession.

An execution having been issued in this case against the defendants, and the stayor, Coleman, upon whose property it was levied, as there was not sufficient property of the defendants to satisfy it, he obtained this *supersedeas* upon the ground that he was not legally bound under the circumstances stated. The Court being of that opinion quashed the execution. The case was submitted to a jury upon certain issues, and the Court instructed them that the stayor was not bound, because the confession of judgment and acceptance of the stay was not at the office of the justice, and could not be binding and valid at any other place.

The case of *Hinnegan & Knox v. Jesse Mee*, 4 Sneed, 35, is relied upon by both parties in the argument. In that case it was held that the presence of the stayor before the justice at the time his name was entered was not necessary to bind him, but that it was only required that he should acknowledge himself as security for the stay of execution, in the presence of the justice, *at his office*, and be accepted by him, though it were subsequently, and after he had left, entered by the justice upon his docket. This was certainly right, and is not now controverted; but it is contended that was not done, in this case, at the office of the magistrate, but a number of miles from it. There is a certain place fixed by law for the Courts to transact business, but none for justices of the peace, except that it must be at some place within their county. It

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is said by his Honor in this case, and so argued here, that the office of a magistrate is his ordinary place of doing business, and where his papers are kept. That may be so in common acceptation, but certainly it is not exclusively so in regard to his powers and the validity of his acts. He can and does perform official binding acts wherever he may be, in his county. He is an officer for the whole county, although elected by and located in a particular civil district.

Nothing more, then, is intended when it is said that the agreement to become stayor must be made before him at his office, than that it must be at the place where he performs the official act of rendering or accepting the confession of the judgment which is to be stayed. That is his office for that purpose and occasion, as much as is his ordinary place of doing business. The legal effect of his acts, and the undertakings of others before him, are as binding at the one place as the other.

The judgment of the Circuit Court will, therefore, be reversed, the *supersedeas* discharged, and judgment rendered here, under the Code, against the petitioner and his sureties.

JAMES J. BROWN *et al.* v. WILLIAM CANNON *et al.*

WILL. *Construction.* The testator gave to the children of his son certain lands and slaves. Said property and its increase, or the proceeds of the slaves and farm, were not to be subject to the debts of the son, but to go wholly to the support of said children and their mother. At the death of said son and his wife, said land and slaves and increase was to be equally divided between said children. Trustees were appointed to take charge of and manage the property, with power to sell and re-invest. The testator gave his son \$500 and a bed, as his full share of his estate. The testator, by a codicil to his will, revoked all of said provisions of his will, except the slaves, men-

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tioning Peter in the codicil, who was not mentioned in the will; and also gave \$3000 in lieu of the tract of land. Two of the slaves mentioned in the codicil were levied on by the creditors of the son. Held:

1. That the land and slaves mentioned in the will were given to the children of the son, subject to the use of the father and mother for life; but the same is not subject to the debts of the son.

2. That the interest of the son is not enlarged by the codicil. The dispositions and provisions of a will are not to be regarded as changed or disturbed by a codicil, any farther than is absolutely necessary to give proper effect to the latter.

3. The only effect of the codicil is to substitute the slaves enumerated for those bequeathed in the will, and the sum of \$3000 for the land. It does not change the character of the title, nor the trusts attached to the property.

FROM OVERTON.

At the October Term, 1859, Chancellor VAN DYKE pronounced a decree for the complainants. The defendants appealed.

McHENRY, and BRIEN & COX, for the complainants.

W. E. B. JONES, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The defendant, Cannon, having executions in his hands as sheriff of Overton county, in favor of the other defendants, for a large amount, against the complainant, Jas. J. Brown, levied the same upon the slaves, Joe and Peter, as his property. Whereupon, this bill was filed by the debtor and his wife and children, to perpetually enjoin the sale, upon the ground that said slaves were not the property of said James Jefferson Brown, but that of his children.

The question depends upon the construction of the will and codicil of Reuben Brown, made in the State of Georgia, in

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the year 1850. The third clause of the will, so far as it relates to this property, is as follows :

“I have heretofore given to my son, James Jefferson Brown, in cash, and good property, \$2700, and in addition to this amount, I give to his children the following property,” (nine slaves, by their names and ages, including Joe, but not Peter.) “And my plantation, called and known as the ‘Good Run Place,’ in Monroe county, adjoining Ben Watkins’ and Currey’s lands, containing 548 acres, more or less,” with all the stock, tools, &c., on the said land. “And all the above property is not to be found subject to my son’s debts, it, nor its increase, nor proceeds of said slaves nor farm. But to go wholly to the support of his children, and his wife’s support. And at his wife’s death, and the death of my son James Jefferson Brown, then all the above property, and its increase, is to be equally divided between my son’s children.” After a bequest of another slave to a grand son, he proceeds : “And having the utmost confidence in John H. Thomas, and Jas. Jefferson Brown, of Overton county, Tennessee, I do constitute them trustees as to the above property I have given to my son J. Jef. Brown’s children, and his wife, for their separate support and my son’s.” He then provides for a sale of any of said slaves who may misbehave, by the trustees, who are to reinvest the proceeds in other slaves, and proceeds : “Also, I give to my son Jas. Jef. Brown, \$500 in cash, to be raised out of my estate, and one good bed, furniture and stead, to be worth \$60, and when he receives this \$500 and the bed, that is to constitute his full share of my estate, and he is not to have another cent of my estate.”

This will is dated in January, 1850. In September, of the same year, a codicil is attached, which, after referring to his will, its date, and the witnesses to it, and stating that he is desirous of “altering and changing a devise in said will,” proceeds as follows :

1. “I revoke and change so much of said will as relates to the land as given to my son Jefferson, and all other devises and bequests whatsoever, except the following negroes, viz :

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Isaac, Joe, Siller, *Peter*, Rachel, Moses and his wife Rachel, Emeline, Green and Daniel.

2. "I give and bequeath to my son Jefferson, \$3000, to be paid out of my estate, in lieu of the lands in said will."

The codicil then proceeds to make some reference to something he had heard as to the intention of his son Jefferson to "resist" his will, by setting up some independent claim to a portion of his slaves, and provides, that in the event he does so, all bequests and devises in his favor shall be revoked, &c. This part of the codicil does not reflect any light upon the question of construction now presented, as we think, the contingency referred to not having occurred.

By the will, we consider it very clear, that the slaves and land were given to the children of Jefferson, incumbered with the use for life of their mother expressly, and the said Jefferson, by implication. To secure the rights of the children more effectually, trustees were appointed to protect the property, and to make changes in certain events. The property is expressly guarded against the creditors of Jefferson. The will most explicitly limits his benefits under it to the \$500, and bed and furniture.

But it is insisted that his interest in the slaves is enlarged by the codicil. Though this argument is plausible, we think such was not the intention of the testator. The rule on this subject as laid down in 1 Jarman on Wills, 160, we think the correct one; and that is, that the dispositions and provisions of a will is not to be regarded as changed or disturbed by a codicil, any further than is absolutely necessary to give proper effect to the latter.

The only necessary effect of this codicil is, to substitute the slaves therein enumerated, for those bequeathed in the will, and the sum of \$3000 for the land. It does not change the character of the title, nor the trusts attached to the property.

Construing the will and codicil together, as we must do under the rule stated, the effect is to attach to the bequest of the codicil all the trusts and restrictions of the will. The

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only alteration made, is, as to the property bequeathed; the ownership remains the same. The title to the property in the codicil, then, vests in the children of Jefferson, incumbered with the enjoyment of the use for life by their father and mother.

The codicil taken by itself, would indicate that the land and slaves had been given in the will to his son Jefferson. But that is not so, and it is only by reference to the will that the codicil can be properly understood. Looking at both, however, as reflecting light upon each other, and viewing the true intention of the testator, all difficulty is removed, and the apparent inconsistency obviated. This illustrates the wisdom and absolute necessity of the rule, that in ascertaining the meaning of an instrument, all its parts, and even other writings on the same subject, in relation to the same matter, are to be looked to and examined in connection.

It is true, that the slave Peter is not named in the will, but that can make no difference, as the title to him passes in the codicil with the others, to the children, and is connected in like manner with the provisions of the will.

Neither of the slaves levied upon were, therefore, subject to the debts of Jefferson, and the Chancellor correctly held, that the defendants should be perpetually enjoined from selling them for the satisfaction of their executions, against him.

The decree will be affirmed.

Thomas T. Crowder v. Charles Denny.

THOMAS T. CROWDER v. CHARLES DENNY.

1. **CHANCERY JURISDICTION.** *Securities, contribution by.* If two or more sureties are bound for the same principal and upon his default one of them is compelled to pay the money or perform any other obligation, for which they all become bound, the security who has paid the whole can, in a Court of Equity, compel contribution from all the others, for what he has done in relieving them from a common burthen.
2. **SAME.** *Same. Remedy at law.* The jurisdiction conferred upon Courts of Law upon this subject, as well by the ordinary action as by motion, does not affect that originally and intrinsically belonging to equity.

FROM WHITE.

Chancellor VAN DYKE dismissed the bill upon demurrer, at the March Term, 1858. The complainant appealed.

COLMS, for the complainant.

GARDENHIRE, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor, in this case, sustained the demurrer, and dismissed the bill. We do not concur in this decree. Among other grounds of equitable relief, the bill states that the defendant is justly indebted to complainant for one-half of a judgment in the Circuit Court of White county, against him and defendant and one G. W. Carter, in favor of the State of Tennessee, for one hundred and thirty, or one hundred and fifty dollars; that complainant and defendant were the joint securities of said Carter, and, as such, were sued, and complainant has paid the same, and defendant is liable to him for contribution for one-half of the same.

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This makes a proper case for relief in equity. No jurisdiction is better established than that of contribution between sureties, who are bound for the same principal, and, upon his default, one of them is compelled to pay the money, or perform any other obligation, for which they all become bound. In cases of this sort, the surety who has paid the whole is entitled to receive contribution from all the others for what he has done in relieving them from a common burthen. 1 Story's Eq., sec. 492. And the jurisdiction now assumed in Courts of Law upon this subject, as well by the ordinary action as by motion, in no manner affects that originally and intrinsically belonging to equity. 1 Story's Eq., § 64, i, 496; *House v. Cocke*, 1 Ten., 296.

The Chancery Court then having jurisdiction as to this particular transaction—if there were other matters in the bill not cognizable in a Court of Equity, or as to which the complainant was not entitled to relief—the defendant should have confined his demurrer to these, and not, as he did, have taken a demurrer to the entire bill. By so doing the demurrer lost its effect entirely, and the defendant became bound to answer fully as to all the matters of the bill.

This view of the case makes it unnecessary to examine the questions arising upon the other portions of the bill asserting equity jurisdiction under the head of account and discovery.

The decree of the Chancellor will be reversed, and the cause remanded for an answer.

William Winton, Admr., &c. v. Jesse Eldridge.

WILLIAM WINTON, ADM'R, &C. v. JESSE ELDRIDGE.

INSOLVENT ESTATES. *Distribution of. Vendor's lien. Administrator.* The statutes regulating the distribution of insolvent estates were not intended to affect liens upon any part of the property of the estate, acquired in the lifetime of the deceased. And if a tract of land belonging to an insolvent estate is sold to enforce the vendor's lien, the proceeds of which do not satisfy the debt, such vendor stands upon an equal footing, as to the remainder of his debt, with the other creditors, and is entitled to his *pro rata*, on such balance, out of the assets.

FROM OVERTON.

This was an appeal from a decree pronounced by Chancellor VAN DYKE, at the October Term, 1859.

JONES and SWOPE, for the complainant.

McHENRY, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed under the insolvent laws, against the creditors, for the administration of the estate of Sherod M. Keeton, by his administrator. It is brought before us upon a single question, in relation to the claims of Eldridge against the estate, on his appeal from the decree of the Chancellor.

The debt to Eldridge was the consideration for a tract of land sold to Keeton, a short time before his death, for which he held a bond for title, upon the payment of the price. This debt, amounting to \$2,479.40, according to the report of the Master, was declared to be a lien upon the land, and for the satisfaction of which it was decreed to be sold, and was sold

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for \$2,340, and bought by Eldridge, leaving a balance due to him as a creditor. It was insisted by the other creditors, and so held by the Chancellor, that Eldridge should be postponed in the distribution of the assets, as to the balance of his claim, until the other general creditors should be made equal with him, in proportion to the amount of their debts, respectively. That is, that he should account for the \$2,340, before he could receive any more of the assets. In this, we think his Honor erred. It would deprive this creditor of the legal advantage of his lien, and place him on the same footing with the general creditors.

We have settled, in the case in 1 Sneed, 354, that the statutes regulating the distribution of insolvent estates, were not intended to affect liens, upon any part of the property of the estate, acquired and fixed in the lifetime of the deceased. These rights continue as if there had been no death, and no statutes on the subject, so far as their priority of satisfaction is concerned. The property on which the lien exists, goes into the estate incumbered with the lien debts. Or more correctly speaking, it is only what remains after the discharge of the incumbrance, that goes into the fund for distribution.

From this, it must necessarily follow, that the appropriation of the property to the satisfaction of the debt for which it is bound, cannot in any way affect the rights of the favored creditor to participate equally, as to any other debt he may have, in a *pro rata* distribution of the assets, with all other general creditors. His remaining claim is as meritorious as theirs, and can in no way be affected by the enforcement of his distinct, independent right of lien.

Another question is suggested in relation to \$1,100 of the debt of Eldridge. When the trade was made, Keeton was to pay \$1,100 of the \$2,500, in a negro woman; but afterwards, and before the delivery of the slave, it was agreed that that part of the trade should be rescinded, and the said sum of \$1,100 was included in a separate note, which contained this clause, "This note is given for land, and the same is to stand

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bound for the purchase money." There can be no doubt but that this was as much a lien upon the land, as the note for the other portion of the consideration, or, as if it had been given in the first instance.

The decree on the point presented will be reversed, and the case remanded.

JAMES H. BEASON v. JOHN PORTERFIELD.

REDEMPTION. *Equitable interest. Chancery sale.* Although an equitable interest may be as much subject to redemption as a legal interest; yet, the purchaser of land at a Chancery sale acquires an equitable title, upon the implied condition that the purchase money should be paid at the time stipulated—the payment of the consideration is essential to complete the equity; and if the land is sold, under the decree of said Court, to enforce the payment of the purchase money the land is not subject to redemption.

FROM FENTRESS.

At the April Term, 1859, Chancellor VAN DYKE pronounced a decree for the complainant. The defendant appealed.

W. E. B. JONES, for the complainant.

F. B. FOGG, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This bill was filed to enforce a supposed right of redemption, against the defendant, to a tract of land lying in Fen-

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tress county. The facts of the case are as follows: By a decree of this Court, made at the December Term, 1845, in the case of *John McIver's Admr., v. Huddleston et al.*, said tract of land was declared subject to the lien of the vendor, for the unpaid purchase money; and was ordered to be sold, unless the amount due were paid within a limited time. This not being done, the land was sold by the Clerk and Master of this Court, on the 25th of July, 1846, and the complainant and one Gwin became the purchasers thereof, at the price of \$305, for which, notes with security, payable to the Clerk and Master, at one and two years, were executed. Said sale was reported to the Court, and *confirmed*, at the December Term, 1846; and it was ordered, amongst other things in the decree of confirmation, "that upon payment of the notes given for the purchase money, the Clerk and Master shall execute a deed to the purchasers," &c.

Several years afterwards, namely, at the December Term, 1852-3, of this Court,—the purchase money still remaining, in part, unpaid,—judgment was rendered, on motion, in this Court, against complainant and Gwin, and their surety, for \$205, the balance remaining due. On this judgment, execution issued, and was returned *nulla bona* as to all the defendants; and at the December Term, 1854, a further decree was made, by which the Clerk and Master was directed—if the money were not paid into the office by a day fixed in the decree—to re-sell said tract of land; and, on receiving the purchase money, to execute a deed to the purchaser, and award a writ of possession.

This decree was not obeyed; and, on the 25th of April, 1855, the land was again sold by the Master, to Jane McIver, for \$257, who transferred her interest under the purchase to the defendant, Porterfield; and the purchase money having been paid, the Master made a deed to the latter, who was put in possession of the same by the sheriff, on the 3d of October, 1855, pursuant to the decree of this Court.

Within two years from the time of the last sale, the complainant—who alleges that he acquired the interest of Gwin

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—tendered to the defendant the amount of the purchase money, with interest, and claimed a redemption of said land, which was refused. The Chancellor decreed for the complainant.

We think the decree is altogether erroneous. The mere statement of the facts is enough to demonstrate that, upon the familiar principles which govern the discretion of a Court of Equity, in decreeing a specific performance, the complainant is entitled to no relief. It is conceded, that an equitable interest is as much subject to redemption as a legal interest. But the position assumed, that the complainant, by his purchase, acquired an equitable title to the land, is not so clear. True, the sale was confirmed, but this was, at least, upon the implied condition that the purchase money should be paid at the time stipulated; the payment of the consideration was essential to complete the equity. And it cannot be doubted for a moment, that, on the refusal of the purchaser to complete his purchase, by payment of the money, he forfeited his inchoate right; and it was proper for the Court to order a re-sale of the land. Nor can it be questioned, that the inevitable effect of the decree of December, 1854, was to rescind the contract of sale, and to cut off all right on the part of complainant, on his failure to pay the money as therein directed. His non-compliance, was a voluntary abandonment of his right. Indeed, the whole question is concluded by that decree; for, by its express terms, the Master was required, if the money were not paid within the time limited, to re-sell the land, invest the purchaser with the title, and place him in possession thereof; all which was done accordingly.

This decree must be regarded as a final and conclusive adjudication of the question. It amounts to an extinguishment of the complainant's right; and it invests the defendant with an indefeasible title in fee simple.

Consequently, the right of redemption set up in the bill, has no foundation to rest on.

Decree reversed, and bill dismissed.

William Earles *et al.* v. Nancy Earles *et al.*

WILLIAM EARLES *et al.* v. NANCY EARLES *et al.*

1. CHANCERY PRACTICE. *Bill dismissed upon motion, or by the Chancellor.* A bill totally wanting in equity upon its face, or which shows that the complainant is entitled to no relief, may be dismissed upon the motion of the defendant, or by the Chancellor of his own accord. Such a bill requires no answer, and its dismissal can do no injury to the complainant.
2. STATUTE OF LIMITATIONS. *Resulting trust. Act of 1715, ch. 48, § 9. Case in judgment.* A resulting trust is barred by the act of 1715, ch. 48, § 9. If the purchase money to acquire title to land is paid by one person, but the title made to another, and the party in whom the legal title is vested dies, suit to establish a trust, if one exists, must be instituted within seven years after the death of such party, or the claim will be barred by the act of 1715.

FROM WHITE.

Chancellor VAN DYKE dismissed the cross-bill, upon demurrer. The complainant in that bill appealed.

MURRAY and SPURLOCK, for the complainant.

COLMS, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor dismissed what is termed the cross-bill upon demurrer. In this he committed no error, for which we deem it our duty to reverse. If that provision in section 2934 of the Code, which requires the demurrer to state the objection relied on, be applicable to Courts of Chancery—and which we do not now decide*—still, a bill totally wanting in equity

* See the case of *Kirkman & Ellis v. Snodgrass*, reported in this volume.

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upon its face, or which shows that the complainant is entitled to no relief, may be dismissed upon the motion of the defendant, or by the Chancellor of his own accord. Such a bill requires no answer, and its dismissal can do no injury to the complainant.

It is palpable here, that complainants are entitled to no relief. As to the claim to the \$200 legacy under the will of Pleasant Earles, and to the one-fifth of the share of his deceased child, in the tract of land in dispute, by descent, in right of their father, Martin Earles, the same, whatever may be the value of complainant's demand thereto, are directly involved in the original suit, and may be very well investigated and settled there, and the cross-bill is wholly useless.

The chief object, however, of what is termed the cross-bill is, to recover, by the complainants, as the heirs of Martin Earles, one hundred of the two hundred acres of land, of which Pleasant Earles died seized. It appears that fifty acres of this land were purchased by Pleasant Earles, in his lifetime, of Robert Anderson, and the deed taken in his name, and that the other fifty acres were granted to him, in his lifetime, by the State of Tennessee; and that in the year 1835 he took possession, and retained it till his death, in the year 1844; and that his devisees—who are the defendants in the cross-bill—have held possession ever since. The complainants allege that though the title was thus taken in the name of Pleasant Earles, yet, that in truth, the purchase money to acquire it was paid by their ancestor, Martin Earles, and that a resulting trust exists in their favor to said lands; and they seek to divest the title to the same out of the devisees of Pleasant Earles.

Without considering the effect of the first and second sections of the act of 1819, ch. 28, upon the case, complainants must be held bound by the act of 1715, ch. 48, sec 9. The bill was not filed until the 29th of September, 1858; and upon well settled principles, the claim could not be enforced, unless suit were brought within seven years after the death of

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Pleasant Earles. *Smith v. Hickman's Heirs*, Cooke, 330 ; *Lewis' Ex'rs v. Hickman's Heirs, et al.*, 2 Tenn., 317.

There are other grounds which, as it seems to us, are equally decisive of the case, but we need not consider them.

The decree of the Chancellor will be affirmed.

O. H. P. SIMS v. THOMAS EASTLAND.

STATUTE OF LIMITATIONS. *Effect of successive possessions.* The possessions of successive tenants under a landlord claiming title by entry only, may be connected so as to create the bar of the statute of limitations under the second section of the act of 1819. It is not necessary that a single tenant should have held possession for the whole term required by the statute.

FROM WHITE.

At the September Term, 1858, GARDENHIRE, J., presiding, there were verdict and judgment for the plaintiff. The defendant appealed.

COLMS, for the plaintiff in error.

M. M. BRIEN and SAMUEL TURNEY, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

In this action of ejectment the defendant in error recovered below the land claimed in his declaration.

The only question made by the plaintiff in error that we consider material to notice arises upon the charge.

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The defence mainly relied upon below was the statute of limitations operating upon a possession of the land in dispute for more than seven years, under William Glenn, who claimed it by entry. The proof was directed to that point, and the case made out by several witnesses that this possession was actual, adverse, and continuous for the term required. But it was by several—some four or more successive tenants—all claiming under the title of Glenn, which was, as before stated, only by entry. Whether this proof preponderated over that of the other side, on this question, we need not say, as it would, in any event, raise the question for the jury, under a correct charge of the Court.

The charge would seem to be contradictory, as it is copied into the record, but the proposition complained of is distinctly enough announced; and it is, that the possessions of successive tenants under a landlord claiming title by entry only, cannot be connected so as to create a bar to the better title. The Court correctly states that possession under an entry for seven years will not confer a fee simple title under the first section of the act of 1819. But as a consequence of this, he proceeds to state, that if Glenn and his heirs placed one person in possession, who held for part of the seven years, and then put in another, &c., so as to make out the term, this would not create the bar, because they would all be trespassers, and, therefore, their possessions could not be united. This would be true, if they were wrong-doers. But they were not, if they held under one having a title either equitable or legal, and whether it were the best title or not. He was asked to charge, that in such a case as that assumed to be made out by the proof, and to which it certainly tended, that the plaintiff would be barred by the second section of the act of 1819. But he refused, and thereby clearly showed to the jury that he held the law to be as indicated in the charge already given; that is, that no bar could be formed under either section of the act of limitations, by successive tenancies, under an equitable title. The idea of his Honor seems to have been that it was necessary to sustain this defence, that

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the claimant, or a single tenant, should have held possession for the whole term required by the statute. This was entirely erroneous. It can make no difference how many tenants there may have been, if they succeeded each other so as to leave no *hiatus*, and all entered and occupied under the same title.

The entry of Glenn was a special one, and would extend the title by possession, under the second section, to the extent of its calls and boundaries. *Ramsey v. Monroe*, 8 Sneed, 329.

For this palpable and material error in the charge, the judgment must be reversed, and a new trial granted.

KIRKMAN & ELLIS v. DAVID SNODGRASS, JR.

1. **PARTNERSHIP.** *Dissolution. Notice to previous dealers.* Persons who have had previous dealings with a firm must have *actual* notice of its dissolution before they are deprived of their right to hold all its members responsible for the contract of one, made in good faith, in the name of the firm.
2. **PLEADING.** *Demurrer. Plea. Answer.* Code, §§ 4818, 4819, 4821. By sections 4818 and 4819 of the Code, the defendant in a suit cannot avail himself of a want of jurisdiction in the Court, except he do so by plea or demurrer. And by section 4821 the filing of an answer is a waiver of objection to the jurisdiction of the Court.
3. **SAME.** *Same. Must be special.* Code, § 2934, *applies to all Courts.* By section 2934 of the Code, demurrers for formal defects are abolished, and those for substantial defects only are allowed; and all demurrers shall state the objection relied on. The provisions of this section are general, and embrace demurrers in all Courts, chancery as well as law.

FROM WHITE.

This cause was heard at the September Term, 1859, before Chancellor VAN DYKE.

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WASHINGTON and COLMS, for the complainants.

SAMUEL TURNEY, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The complainants, who were merchants of the city of Nashville, sold and delivered to the firm of J. & D. Snodgrass, of Sparta, in White county, a bill of goods. This firm was composed of Joseph Snodgrass and the defendant, David Snodgrass, jr., and, at the time of the purchase of the goods, were partners under the firm and style aforesaid. A portion of the goods were purchased in February, 1857, and other portions in March and April of the same year.

On the 14th of September afterwards, the partnership of Joseph and David Snodgrass, jr., was dissolved, but no notice of the dissolution was given to the complainants. The debt for the goods remaining unpaid, in the form of an account upon the mercantile books of the complainants, they, in January, 1858, sent their agent, with the account, to Sparta, to get a settlement of the same from the firm of J. & D. Snodgrass, where he saw Joseph Snodgrass, and closed the account by taking the note of the firm, payable to the complainants, and which they now hold. At the time of taking the note he receipted the account by the note. Joseph Snodgrass has since died, and the defendant insists he is not liable to the complainants either for the payment of the account or note, because the taking of the note extinguished the account, and its execution created no liability upon him, he not being present at the time it was made, and having given no new authority to Joseph Snodgrass for that purpose, and the co-partnership being then dissolved. This position cannot be maintained. We are satisfied, from the pleadings and proof, that at the time of the execution of the note neither the complainants or their agent had any notice whatever of the dissolution of the firm of J. & D. Snodgrass, but acted in the belief that the co-partnership still existed. It is not even

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shown that any publication of the dissolution was made in a gazette. The answer of the defendant, to be sure, so states; but there is no proof of the fact, and we cannot notice it. But even if such a publication had been made, it would avail the defendant nothing, inasmuch as complainants were previous dealers with the firm, and entitled to *actual* notice of its dissolution before they shall be deprived of their right to hold all its members responsible for the contract of one made in good faith in the name of the firm. The defendant does not pretend that any such notice was given by him or Joseph Snodgrass, and we are convinced that complainants, in fact, had no such notice. The result is that the defendant must be held bound for the payment of the note in the same manner as if the firm had not been dissolved. *Hutchins v. The Bank of Tennessee*, 8 Hum., 418; *Hutchins v. Sims*, 8 Hum., 423; *Hutchins v. Hudson*, 8 Hum., 426.

In answer to this it is said complainants have a plain and unembarrassed remedy in a Court of Common Law, and that their bill having been demurred to, the same should have been dismissed, and they left to their legal remedy. We think their remedy at law was complete; but the demurrer here cannot be of any service to the defendant, because it is general in its terms, after the form of a general demurrer in the English chancery practice, and does not state the want of jurisdiction as the ground of it. By section 2934 of the Code, demurrers for formal defects are abolished, and those only for substantial defects are allowed. And all demurrers shall state the objection relied on. The provisions of this law are general, and must, in reason and common sense, be held to embrace demurrers in all Courts, chancery as well as law. By sections 4318 and 4319, the defendant cannot avail himself of a want of jurisdiction in the Court, except he do so by plea or demurrer. And by section 4321 the filing of an answer is a waiver of objection to the jurisdiction of the Court; and the cause shall not be dismissed, but heard and determined upon its merits, although the Court may be of opinion that the matters complained of are of legal cognizance. The

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Chancellor then did not err in overruling this demurrer. Indeed it must be regarded as a nullity; and the defendant having answered, the jurisdiction of the Court of Chancery to hear and determine the cause became perfect. It would be most unreasonable *now*, after these parties have gone through the vexation and delay of a trial in the Court of Chancery and in this Court, to permit the defendant to turn complainants over to their legal remedy, when, if he had stated in his demurrer the want of jurisdiction as the ground of it, the proper forum might, at once, have been resorted to. The decree of the Chancellor will be affirmed.

PASCHAL MANN v. THE STATE.

1. JUROR. *How impeached after verdict. New trial.* After a juror has made himself competent by examination, in a criminal case, and elected by the State and prisoner, to authorize a new trial on the ground of the partiality or prejudice of such juror, the impeaching evidence must be clear and satisfactory, both as to its source and matter, to counteract the oath of the juror.
2. SAME. *Same. How impeaching witness examined. Practice.* When a new trial is asked for, in a criminal case, on the ground of partiality or corruption in a juror, the Circuit Judge should cause the impeaching witnesses to be thoroughly examined in open Court; instead of acting upon their prepared affidavits, though sworn to in Court.

FROM WHITE.

This cause was tried at the January Term, 1859, before Judge GARDENHIRE. The defendant appealed.

SAMUEL TURNEY and SNODGRASS, for the plaintiff in error.

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HEAD, Attorney General, for the State.

CARUTHERS, J., delivered the opinion of the Court.

The plaintiff in error was convicted in the Circuit Court of White county, of murder in the first degree, with mitigating circumstances, for killing John Fugate, on the 8th day of April, 1857. The Court sentenced him to the penitentiary for life. He appeals to this Court for a new trial.

The proof leaves no reasonable doubt upon the mind, but that the defendant, in conjunction with his brother, Philip, who has escaped, and, perhaps, another, perpetrated the murder charged, upon the highway, for plunder. The evidence is circumstantial, but when taken together, the mind cannot resist it. The facts were before us two years ago in the case of Baker, who has since died, in jail. He was convicted of a participation in the same murder. But we gave him a new trial for errors committed in the selection of the jury, without a consideration of the merits. It may be said, however, that the proof in this case is much more convincing and conclusive than it was in that. We entertain no doubt, from the evidence, that this defendant is guilty of a cold blooded highway murder, and we are at a loss to see upon what ground the jury found "mitigating circumstances." It must have been, *merely*, to save life, or because they thought there was a *possibility* of innocence.

This offence was committed before the Code went into operation. Then, the law was peremptory upon the Court, that the punishment of death should be commuted for confinement for life, where mitigating circumstances were found. But, by the Code, it is made *discretionary*, and the proper exercise of that discretion is a question for this Court, in all proper cases. In the case of *John & Jesse Lewis v. The State*, at Knoxville, we affirmed the judgment of the Circuit Judge, rejecting the recommendation by the jury, and the defendants were hung.

Several grounds are relied upon for a new trial, but the principal one is in relation to the incompetency of two of the jurors who tried the case. They were impeached after the trial,

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by affidavits as to their conversations and opinions before, showing that they were not "impartial," but deeply prejudiced against the prisoner. This is the last resort of the worst criminals since the Brakefield case in 1 Sneed, 245.

That case was intended to protect innocence, and secure the purity of the jury trial, and must be guarded against perversion, so as to favor the escape of the guilty. It is easy to see that when all other hope is lost, the temptation would be almost irresistible upon the criminal, as well as his friends, to make out a false case of this kind to avoid the heavy penalty of the law, and secure the chances of another trial or escape from custody. The death of one witness might save the worst murderer. These considerations, to say nothing about the vast expense to the State, of protracted trials, and the delay of justice, impose upon the Courts the duty of guarding with scrupulous care and jealousy, against the abuse of this rule.

In the case of *Workman v. The State*, not yet reported, decided at the last term at Jackson, we held, that the impeaching evidence must be clear and satisfactory, both as to its source and matter, "to counteract the oath of the juror."

It should be remarked further, in relation to this mode of getting clear of a verdict of guilty, always resorted to in the last extremity, that the Circuit Judges should cause the impeaching witnesses to be thoroughly examined in open Court, instead of acting upon their prepared affidavits, though sworn to in Court. This would be the best and safest practice to avoid imposition.

John Halterman was a juror. John Swindle, in his affidavit, states, that previous to the trial, he heard Halterman say to Laban Davis, who was a witness for the State, and was talking to Halterman about the case, that "*if it was the way he understood it, defendant ought to be hung as high as Haman* ; so high, that if he fell from the gallows, that he might sink into oblivion." He says he was a little distance from them, and he may have been speaking about Baker, but he thinks it was the defendant. He states further, that he

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heard this juror examined, and he said he had formed an opinion from rumor. But little stress is laid upon this case. He was, clearly, not incompetent.

Lucus Bronson was also a juror, and it is the impeachment of him that is mainly relied upon. Mrs. Howard, in her affidavit, says, that sometime in the spring, before the trial, she heard Bronson say to a man by the name of DeLancy, that he "thought Mann would be hung, and if he was not hung, he ought to be."

J. T. Howard says, that he "heard Mr. Stewart, and some other gentlemen, speaking of the case against Baker and Mann, said Bronson came in and said, with an oath, "he did believe they both ought to be hung. Affiant was *busy at work*, and if he said more at that time, he did not hear it."

W. R. Stewart says in his affidavit, that "two or three weeks before the trial, in his shop, he heard Bronson speaking of defendant and Jerry Baker, and said, "*I believe Baker and Mann ought both to be hung.*" He says further, that he remarked to Bronson that "he did not know what he was talking about," and he said no more, and the conversation ended.

The State then introduced the affidavit of Menshaw, who proved that he heard both the jurors examined before the Court, before they were presented to the prisoner, and they stated that they had formed and expressed opinions from rumor.

J. P. DeLancy states that he never had any conversation with Bronson as to the guilt or innocence of Mann, in the presence of Mrs. Howard, as she states in her affidavit.

Carrick proved that "W. R. Stewart appeared to take considerable interest for the defendant; Mrs. Howard is the wife of J. T. Howard, and he is the partner of Stewart in the silver-smith business, in Sparta; and Stewart has been jailor since Mann has been in jail," but "he would give him credit on his oath as soon as any man."

It is shown that Bronson lived in Sparta when Baker was tried, in September, 1857, and a short distance from the jail;

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but Lowry proves that he was sick at the time, and unable to go to the court house.

This is the whole case, and the question is, whether the juror, Bronson, is successfully impeached, so as to authorize a new trial.

From the fact that he was selected, he must be presumed competent. To overthrow this, a clear case must be made out against it. He was elected by the defendant, and he must show a stronger case against him after trial, than would be necessary to set him aside before he was selected. All that appears in these affidavits, is, that he expressed strong and decided opinions against the prisoner. That would not have disqualified him in the first instance, if they were formed from rumor. Our decisions are so numerous on this subject that the question in every aspect has been settled. But the Brakefield case brings up, for the first time, the question now presented. In that case, it did not appear by the record, that the juror impeached, had made himself competent on his examination, though that might be implied, from the fact that he was taken. In that case there was nothing to weaken the force of the impeaching affidavits, and they were very strong and pointed.

But the case before us is very different. It is proved otherwise than by the juror, that he admitted he had expressed an opinion, but that it was from rumor. The three affidavits introduced against him, only show simply that he did express an opinion against the prisoner, without stating the source from which it was derived, whether from having heard the witnesses, or from the facts as reported. So all that is proved against him may be true, and yet he be competent, according to the rule on that subject. It may be, that all the juror said in these loose and idle conversations, was not recollected, or stated in the affidavits.

It will be seen, also, that the witnesses are not unexceptionable themselves. Stewart was the jailor, and had taken a *considerable interest* for the prisoner. The other witness, Howard, was his partner, and the third, the wife of Howard.

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Without saying they were unworthy of credit, it is enough that they were not entirely without prejudice. In a case like this, where we can see from the facts that the verdict is right, in order to set it aside upon the ground that a juror was partial or corrupt, the case must be clearly and satisfactorily made out, by witnesses free from all exception.

The judgment will be affirmed, and the prisoner conveyed to the penitentiary, there to remain for life.

BENJAMIN BENTLY v. L. HURXTHAL.

JUDGMENT. *When void as to one of the defendants. Act of 1851-2. Code, § 4516.* By the act of 1851-2, the provision of which is incorporated in the Code, it is provided that no judgment or decree shall be reversed in the Supreme Court unless for errors which affect the merits of the judgment, decision, or decree complained of: And under this rule a judgment will not be reversed which is valid as to one defendant, but void as to another, upon the application of the former. The rule that a judgment is an *entire thing*, and therefore, if void as to one party, cannot be allowed to stand as to any of the other parties, is a purely technical one, and falls within said provision.

FROM CUMBERLAND.

Judgment was rendered in favor of the plaintiff, at the May Term, 1858, GOODALL, J., presiding. The case was brought up by writ of error.

GARDENHIRE, for the plaintiff in error.

COLMS and TURNEY, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

Benjamin Bently v. L. Hurxthal.

This is a writ of error, prosecuted by Benjamin Bently, to reverse a judgment of the Circuit Court of Cumberland county, recovered by the defendant in error, against the plaintiff in error and one B. F. Bently, jointly, as is alleged.

It appears that an action of debt was commenced by Hurxthal against Benjamin Bently and B. F. Bently, jointly. The summons was returned executed on the former, and "not found," as to the latter. Both were declared against, however, and throughout the record, in stating the case, the names of both are continued. In the verdict it is stated, that the "defendants" owe the debt; and the judgment of the Court is, that the plaintiff recover of the "defendant," &c.

B. F. Bently does not join in the prosecution of this writ of error.

It is insisted for the plaintiff in error, that the judgment, as to him, is erroneous; and that as to B. F. Bently, it is absolutely void: And such was the settled course of decision previous to the act of 1851-2, ch.—. But by that act it is declared, among other things, that no judgment or decree shall be reversed in the Supreme Court, "unless for errors which affect the merits of the judgment, decision, or decree complained of." See Code, sec. 4516.

The question, then, is, does the error assigned affect the merits of the judgment, so far as Benjamin Bently is concerned; for B. F. Bently does not complain of the judgment, and with the question, as to him, we have nothing to do, at present.

The rule, that a judgment is an *entire thing*, and, therefore, if void as to one party, cannot be allowed to stand as to any of the other parties, is a purely technical one. A judgment may be correct in all respects as to one party, and altogether erroneous, or void, as to another joint party, as in the case under consideration; and in such case, there is no sufficient reason why the party rightfully charged should be discharged, merely on the ground that another party was wrongfully made liable by the same judgment. This is certainly the just and common sense view of the question, at least, in

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all such cases as the present, where the legal liability of the parties is *several*, as well as joint, and either, or both, may be sued, at the the election of the plaintiff.

But, without reasoning upon the subject, it is sufficient for us to say, that we are denied the power to reverse for mere technical reasons, not affecting the merits of the judgment. In the case before us, the *merits* of the judgment are not in any respect affected, as regards the party now complaining, by the alleged error. And, perhaps, the proper construction, upon the whole record, would be, that the verdict and judgment are to be taken as having been rendered only against Benjamin Bently, the party regularly before the Court by proper service of process; rejecting the use of the word "defendants," in the plural, as a mere clerical error.

The result is, that there is no error in the judgment, and the writ of error will be dismissed.

HENRY GATEWOOD v. GEORGE N. DENTON.

1. **SET-OFF.** *When allowed against a note in the hands of an endorsee.* Act of 1855-6. Code, § 2918-4. The law on the subject of set-off was materially modified, and the remedy enlarged by the act of 1855-6, the provisions of which have been incorporated into the Code. By section 2918-4 of the Code, any equities between the defendant and the original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against the original party, may be pleaded, by the defendant, by way of set-off, or cross-action.
2. **SAME.** *Same. Same.* All that is requisite to entitle the defendant to a set-off against the plaintiff, who, by taking the note after it is due, holds it subject to every equitable defence that may be set up against the payee, is, that the right of set-off, or cross-action, is fixed and complete in the defendant previous to and at the time of the assignment of the note, and could not be resisted by the original party—

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the assignor. No special agreement between the payor and payee before the transfer, is necessary in order that the right of set-off should attach to the note.

FROM FENTRESS.

This cause was heard at the June Term, 1859, GARDENHIRE, J., presiding. Verdict and judgment for the plaintiff. The defendant appealed.

W. E. B. JONES, for the plaintiff in error.

A. A. SWOPE, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a Justice, on a promissory note for \$141, made by the plaintiff in error, Henry Gatewood, to Benjamin Gatewood, on the 18th of September, 1854, due from date; and assigned to the defendant in error on the 24th of December, 1858.

The defence relied on was a set-off, which the Circuit Judge held not to be admissible, as against the assignee of the note.

It appears that on the 8th of April, 1852, Henry Gatewood became bound as the surety of Benjamin Gatewood, for the stay of execution, upon a judgment against the latter, in favor of one Evans, for the sum of \$143.50; and it also appears that, as stayor, he was compelled to pay the full amount of said judgment and costs, on the 23d of April, 1857. The amount thus due to the defendant from Benjamin Gatewood, at the time of the assignment of the note to Denton, and previous thereto, the former claimed the right to set-off against said note. And the question is—did the Court err in refusing to permit this to be done?

The law on this subject was materially modified, and the remedy enlarged, by the act of 1855-6, ch. —, the provisions of which have been incorporated in the Code. By section

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2918-4, it is provided, that "any equities between the defendant and the original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against the original party," may be pleaded, by the defendant, by way of set-off or cross-action.

This provision, it seems to us, embraces the present case. At the time of the assignment of the note to the plaintiff, the defendant had a well founded right of action against the assignor, for an amount larger than the sum due upon the note, for money paid as his security, which he might have recovered by action of debt, or assumpsit, or by motion. The right thus existing had, in the language of the section just quoted, attached itself to the note before its transfer to the plaintiff; or, in other words, the right of set-off, or cross-action, was fixed and complete, in the defendant, previous to and at the time of the assignment of the note, and could not have been resisted by the original party—the assignor. And this is all that is requisite to entitle the defendant to a set-off against the plaintiff, who, by taking the note after it was due, holds it subject to every equitable defence that might be set up against the payee.

It is not necessary that there should have been any special agreement or understanding between the defendant and the payee, that the debt due from the latter to the former should be applied in discharge of the note, in order that the right of set-off should attach to the note; nothing more is essential than that the right to the set-off should, by law, be perfect, as against the original party, at the time of the transfer.

The defendant cannot, of course, as against the assignee, be entitled to judgment for the excess of his cross-demand over the note sued on; all he can claim is, that his demand shall be applied, as far as may be necessary, to extinguish the note sued on; and for the residue he must look to the original party.

In this view, the Court erred in rejecting the defendant's evidence of set-off. Judgment reversed.

John S. Page v. Timoleon Cravens.

JOHN S. PAGE v. TIMOLEON CRAVENS.

ADMINISTRATION. *Suit on judgment, in favor of an administrator, rendered in another State. Debet and detinet.* A suit may be maintained, in the *debet* and *detinet*, on a judgment rendered in a sister State, in the name of an administrator appointed in such State, without taking out letters of administration in this State.

FROM FENTRESS.

Verdict and judgment for the plaintiff, at the June Term, 1859, GARDENHIRE, J., presiding. The defendant appealed.

TURNER and HILDRETH, for the plaintiff in error.

A. A. SWOPE, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

We perceive no error in the judgment of the Circuit Court, in this case. The action is debt upon a judgment rendered in the Circuit Court of Clinton county, in the State of Kentucky, in favor of Cravens, as the administrator of William G. Sabban, deceased, against the plaintiff in error—upon a cause of action which accrued in the lifetime of the intestate. The suit in this State was properly brought in the *debet* and *detinet* by Cravens in his individual capacity. To enable him to do so, no letters of administration in this State were necessary; and being in his own right, the naming himself administrator is but *descriptio personæ*, and does not alter his character. *Biddle v. Wilkins*, 1 Pet., 686; *Hunt v. Lytle*, 6 Yer., 412, 417; *Braden v. Hollingsworth*, 8 Hum., 19.

The judgment will be affirmed.

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HENRY R. THOMPSON v. S. B. DAWSON *et al.*

WAIVER. *Vendor's lien.* If a vendor who holds a lien upon land for the payment of the purchase money, by affirmative acts and declarations, induces the belief, on the part of a subsequent purchaser, prior to his purchase, that he renounces or abandons his lien, it is a waiver thereof, and the vendor cannot, thereafter, enforce it, to the prejudice of such purchaser.

FROM FENTRESS.

Decree for the complainant, at the April Term, 1857, VAN DYKE, Chancellor, presiding. The defendants appealed.

SWOPE & HILDRETH, for the complainant.

SAMUEL TURNEY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant seeks, by this bill, to enforce a lien supposed to exist in his favor, as vendor, upon a lot of ground situate in the town of Jamestown.

The record presents the following state of facts:

In the year 1853, John Linder sold said lot to one Northrup, and executed to him a bond for title. Northrup sold his equitable interest in the lot to Hildreth, and made an assignment to him of said title bond. Hildreth, afterwards, made a verbal sale of his interest in the lot to the complainant, Thompson; and the latter, on the 26th of May, 1854, sold to Maxwell and Goldston for \$250, for which a note was made and delivered to him. Shortly afterwards, Maxwell & Goldston sold their interest in the lot to the defendants, Dawson & Culver.

No *written* assignment of Linden's title bond was made to

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complainant, on his purchase from Hildreth; but, at the request of complainant, Hildreth assigned said bond to Maxwell and Goldston, after their purchase from complainant.

By a subsequent arrangement between all the before named parties, including the complainant, it was mutually agreed that Linder, the original vendor, (whose purchase money had been paid,) should execute the deed for the lot to Dawson and Culver; and his bond for title being surrendered, he conveyed to them accordingly.

At the time of this transaction, the principal part of the purchase money due from Maxwell and Goldston to the complainant, remained unpaid; and of this fact Dawson and Culver had full knowledge at the time of their purchase of the lot. Some considerable length of time after the conveyance of the lot to Dawson and Culver, Maxwell and Goldston (who were silent when said arrangement for the conveyance to defendants was entered into) failed and became insolvent; whereby the complainant was unable to collect the balance of the purchase money due from them for said lot. And, thereupon, he brought this bill to subject the lot to the satisfaction thereof, upon the assumption that a lien existed in his favor; and the Chancellor so decreed.

We think the decree is erroneous. Admitting that the vendor has a lien for the purchase money in case of the sale of an equitable estate, in like manner as the sale of legal estates; and admitting further, that, upon the doctrine of the case of *Wilburn v. Spofford*, 4 Sneed, 698, the transfer of the title bond to the complainant, by mere *delivery*, was sufficient to vest him with the equitable title, upon payment of the purchase money, as fully as if the transfer had been by a *written assignment*; and, consequently, that a lien did exist in his favor; still, we are of opinion, that, under the circumstances of the case, the complainant should be held to have *waived* such lien.

From all the facts of the case, it sufficiently appears, that, at the time of the purchase of the lot by the defendants, the complainant was perfectly satisfied with the personal responsibility of Maxwell and Goldston, who were then solvent. And

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neither at the time of the defendant's purchase of the lot from Maxwell and Goldston, of which complainant had full knowledge; nor at the time when they, by his consent, procured a conveyance of the legal title from Linder, did he pretend to have any lien on the lot. But, on the contrary, his conduct and declarations were such as to induce the defendants to make the purchase, and accept the legal title, under the belief that he had surrendered all claim to the lot, and relied solely, for the payment of the purchase money, upon the solvency of Maxwell and Goldston.

All other considerations aside, it may perhaps be well doubted whether the fact that his consenting that the legal title of the defendants should be perfected, under the circumstances, without any claim or reservation of lien on his part, was not of itself a *waiver* of his lien. But, however this may be, to allow him to set up a lien, in view of all the facts of this case, would be to aid him in the commission of a fraud on the defendants.

We are not to be understood as holding, that the mere silence of the complainants, or omission to assert his right in express terms, would have prejudiced his lien. The ground on which we place the *waiver* is, that his affirmative acts and declarations in regard to the matter were sufficient to induce the belief, in the minds of the defendants, that he renounced the lien.

From the whole case, it is apparent that the idea of an existing lien on the lot did not enter the mind of the complainant, until after the failure of his immediate vendees.

The decree will be reversed, and the bill dismissed, and the cross-bill also.

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PINA A. COPE, BY, &C. v. JOHN MEEKS et. al.

HUSBAND AND WIFE. *Deed executed, alone, by the wife, is void. Act of 1715, cA. 28.* The act of 1715, ch. 28, substituted a deed, jointly executed by husband and wife, and acknowledged in the form prescribed, instead of the common law modes of conveyance, and in no other way can the wife's freehold estate pass, under our law. It is indispensable that the husband shall be a party to his wife's conveyance: if not, the same is a nullity.

FROM GRUNDY.

At the September Term, 1858, Chancellor RIDLEY pronounced a decree for the complainant. The defendants appealed.

FRAZIER, for the complainant.

HICKERSON, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant, who is a married woman, brought this bill, by her next friend, to set aside a conveyance, alleged to have been obtained from her by fraud, of her interest in the real and personal estate of her deceased father, Thomas Saunders, late of Grundy county.

The proof shows, that the defendant, William Cope, the husband of complainant, agreed to sell to the defendant, Meeks, his wife's interest in said estate, including both the realty and personalty, for the consideration of \$400. For which Meeks executed to him his notes, except some small amount paid in hand.

A joint deed from Cope and wife to Meeks, for the wife's undivided interest in the estate, was prepared, and the wife's

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signature to the same was procured, at a distance from home, and in the absence of her husband, under circumstances which are calculated to excite strong suspicion as to the fairness of the transaction. But for some reason, not disclosed in the record, the husband did not execute said deed. And so far as we are informed, the contract, as to him, rests merely in parol. The clerk's certificate of the wife's acknowledgment and privy examination, in the usual form, is upon the deed: and it seems to have been registered some two years afterwards.

The complainant's share of the real estate has not been laid off; and her distributive portion of the personalty remains in the hands of the administrator.

Passing by the question of fraud, we proceed to inquire whether this conveyance by the wife alone, is of any validity or effect.

By the common law, the conveyance of a *feme covert*, except by matter of record, was absolutely void. The only modes in which she could convey her real estate, were by fine and common recovery. 2 Kent's Com., 150.

These methods of passing the freehold estate of the wife, were never in use in this State. The act of 1715, ch. 28, substituted a deed, jointly executed by husband and wife, and acknowledged in the form prescribed, instead of the common law modes of conveyance: and in no other way can the wife's estate pass, under our law. It is indispensable that the husband shall be a party to his wife's conveyance. She has no power, under the statute, to convey by her own deed; and such a conveyance is simply a nullity. 2 Kent's Com., 154; 2 Story's Eq. Jur., secs. 1391, 1392 and notes. The reason why the husband was required to join with his wife in the conveyance was, that his assent might appear upon the face of it, and to show he was present to protect her from imposition. Ibid. 152.

What effect, if any, this deed, if acquiesced in, might have in possible contingencies that might happen in future, we need not stop to inquire. It is sufficient for the present case

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to say, that, being resisted, it is wholly inoperative; and, consequently, interposes no obstacle to the relief sought by the bill.

D. cree affirmed.

HIRAM A. DRENNON v. E. S. SMITH.

1. **EVIDENCE.** *When the admissions or declarations of the assignor of a contract admissible.* Admissions or declarations made by the assignor of a personal contract, or chattel, previous to the assignment, while he is the sole proprietor, and when the assignee must recover through the title of the assignor, are admissible as evidence against the assignee.
2. **SAME.** *Same. Identity of interest.* This rule applies, only, where there is an identity of interest between the assignor and assignee. Thus, the declarations of a former holder of a promissory note negotiated before it was over due, showing that it was given without consideration, though made while he held the note, are not admissible against the endorsee; but in an action by the endorsee of a bill or note dishonored before it was negotiated, the declarations of the endorser, made while the interest was in him, are admissible evidence for the defendant.

FROM WILSON.

This cause was heard at the May Term, 1859, DAVIDSON, J., presiding. Verdict and judgment for the plaintiff. The defendant appealed.

W. L. MARTIN, for the plaintiff in error.

JORDAN STOKES and E. J. GOLLADAY, for the defendant in error.

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WRIGHT, J., delivered the opinion of the Court.

Smith sued Drennon, by warrant before a Justice of the Peace, upon a note under seal, for thirty-five dollars, executed by him, on the 17th of December, 1855, payable to W. M. Carpenter, one day after date, and by him endorsed to the plaintiff, Smith. The case was taken to the Circuit Court by appeal, and upon the trial the defendant proved by one Nelson, that at the date of the note he was a Justice of the Peace of Wilson county, that Carpenter, to whom the note was payable, was a constable—that Carpenter came to his house and got some executions against Drennon, in favor of Witty—that at the time he procured the executions, he asked the witness if it would be any harm for him to make an arrangement with Drennon, by which Drennon should pay him for holding up the executions until he returned from a trip down the river with some timber. He told Carpenter he thought not. The defendant then offered to prove by this witness, that a day or two afterwards, Carpenter told him that he had taken Drennon's note for \$30, or \$35, and he had agreed to wait until he returned. This was objected to, and the objection sustained by the Court.

The defendant then proved by W. G. Robertson that he made a settlement between Drennon and Carpenter after Drennon's return from his trip down the river, and that the executions in favor of Witty were settled and paid in that settlement, and that the note in controversy had not then been transferred. And he then offered to prove by this witness, that at the time of the settlement the note was spoken of, and it was agreed between Drennon and Carpenter, that it had been given in consideration that Carpenter would indulge Drennon on the executions in favor of Witty; but this was also objected to, and the objection sustained by the Court.

In these rulings of the Circuit Judge there is error. It is not contended that the proof offered, if believed, would not constitute a valid defence to the note, as between the maker and payee. And it cannot be maintained here, that the plain-

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tiff occupies any higher ground than does Carpenter, from whom he acquired the note—he having taken the same after it was past due and dishonored, and the *declarations of the endorser having been made while the interest was in him*. In such a case they are admissible evidence for the defendant, and derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, and may be proved by any competent witness who heard them, without calling the party by whom they were made, and whether he be competent or not. The question is, whether he made the statement, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive, (and it seldom is so,) may be controverted by other testimony; even by calling the party himself, when competent; but it is not necessary to produce him, his declarations, when admissible at all, being admissible as original evidence, and not as hearsay. Thus, the admissions, or declarations, made by the assignor of a personal contract, or chattel, *previous to the assignment, while he remains the sole proprietor*, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of the transfer, are admissible evidence against the assignee. In such a case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor and assignee; and such identity is deemed to exist, not only where the latter is expressly the mere agent and representative of the former, but also where the assignee has acquired a title with actual notice of the true state of that of the assignor, as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion. Thus, also, the declarations of a former holder of a promissory note, negotiated before it was over-due, showing that it was given without consideration, though made while he held the note, are not admissible against the endorsee; for the right of a person, holding by a good title, is not to be cut

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down by the acknowledgment of a former holder, that he had no title. But in an action by the endorsee of a bill, or note, dishonored before it was negotiated, the declarations of the endorser, made while the interest was in him, are admissible in evidence for the defendant. 1 Greenl. Ev., secs. 171, 180, 190 and 191.

But it is argued that it is a rule of law, founded on public policy, that no party who has signed or endorsed a negotiable paper, shall ever be permitted, by his testimony, to invalidate it, and that, *a fortiori*, it must be so as to his declarations. It is sufficient for us to say, the established rule is otherwise in our State. *Stump v. Napier*, 2 Yer., 35, 50.

Reverse the judgment, and remand the case for another trial.

J. M. BURROUGH *et al.* v. W. G. BROOKS *et al.*

ATTACHMENT. *Effect of an assignment of property after the filing of an attachment bill.* Act of 1836, ch. 43. Code, § 3507. By the 9th section of the act of 1836, ch. 43, carried into the Code, § 3507, any transfer, sale, or assignment made after the filing of an attachment bill in chancery, of property mentioned in the bill or attachment, as against the complainant, is inoperative and void, although such conveyance may be registered before the levy of the attachment upon the property.

FROM FRANKLIN.

Chancellor RIDLEY pronounced a decree for the complainants, at the November Term, 1859. The defendants appealed.

A. S. COLYAR, for the complainants.

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ESTELL and TURNKY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The complainants are the accommodation securities and endorsers of one Tyree Oldham, and as such filed this bill in the Chancery Court at Winchester, on the 24th of November, 1857, under the 8th section of the act of 1836, ch. 43, to attach his estate. The cause stated for the attachment is, that said Oldham was about to remove his property beyond the limits of this State. The attachment issued on the same day the bill was filed, and was immediately levied on certain slaves and other effects of the defendant, about which there is no controversy; but as to the slave, Nancy, it was not levied until fifty minutes past 8 o'clock, A. M., of the next day.

In the meantime, while the attorneys of the complainants were drafting the attachment bill on the evening of the day it was filed, the defendant, William G. Brooks, with whom Oldham boarded, went to their office, and ascertaining the fact that a bill was to be filed, caused Oldham, on that same night, to execute for his benefit and the benefit of certain other persons, a deed of trust, in which the slave Nancy was embraced, and had the same registered at fifteen minutes past twelve o'clock on the morning of the 25th of November, 1857, before the levy upon the slave Nancy; but the deed was taken and registered *after the filing of the bill* and the issuance of the attachment, and is dated on the 25th of the month.

Upon these facts, the Chancellor held the deed of trust inoperative and void as against the complainants, the attaching creditors. In this opinion we concur. The 9th section of the act above mentioned provides that any transfer, sale, assignment, &c., made by any non-resident or absconding debtor, after the filing the bill, shall, as against the complainant or complainants, be inoperative and void. It is not denied that if this were the case of a non-resident or absconding debtor, the decree of the Chancellor would be right. But it is said

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that inasmuch as the case is that of a debtor who is *about to remove his property beyond the limits of the State*, the section can have no application. We do not assent to this reasoning. The 8th section of the act giving the remedy to an accommodation security or endorser, where the principal is about to remove, or is removing, or absconding and carrying off his property beyond the limits of the State, expressly provides that the *provisions of the act shall apply*. The meaning of this is, that the accommodation endorser and security, in such cases, shall have the benefit of the entire act, which of course includes the 9th section. It was not intended by the use of the terms non-resident or absconding debtor, to limit the operation of the 9th section of the act to the cases there enumerated, but it has a more extended meaning, and embraces the present case, as is manifest from a consideration of the whole act. The object, no doubt, was to prevent the debtor from evading the attachment, after the bill was filed and before the levy, by sales or transfers of his estate; and the policy and wisdom of the principle are equally applicable to all the cases for which an attachment is provided in the act. If the language were more doubtful—the entire act considered—we should be inclined to give it a liberal interpretation in favor of the remedy of the surety and endorser, so as fully to carry into effect what we consider the intention of the Legislature. *Lester v. Cummings*, 8 Hum., 388.

The 9th section of the act of 1836, is carried, with some enlargement of language, into the Code, at section 3507, which provides that any transfer, sale, or assignment, made after the filing of an attachment bill in chancery, or after the suing out of an attachment at law, of property mentioned in the bill or attachment, as against the plaintiff, shall be inoperative and void. But this bill being filed before the Code, rests upon the act of 1836.

This makes it unnecessary to determine the question of fraud raised in the case upon the deed of trust.

Decree affirmed.

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JAMES ROBINSON v. WILEY DENSON, EX'R, &c., *et al.*

1. **TRUST AND TRUSTEE.** *Will. Consideration.* If, upon the execution of a will, a person who takes no benefit under it, promises the testator to give one of his children as much property as he, the testator, will be able to give his other children; and, thereby, induces him not to give such child any part of his estate, the promise is without consideration, and no trust is created in favor of the child, that can be enforced against the party making the promise.
2. **SAME.** *Fraud. Question reserved.* What would be the effect of a fraudulent promise of this description, by which an injury or loss resulted to the party for whose benefit the promise was made?

FROM FRANKLIN.

Upon the hearing in the Court below, at the November Term, 1859, Chancellor RIDLEY, dismissed the bill. The complainant appealed.

PETER TURNEY, for the complainant.

A. S. COLYAR, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Matthew Robinson made his will, and died in 1831 or 32. The complainant is one of his sons, and James Robinson, deceased, the testator of defendant, Denson, his brother. Matthew had a number of children, and but a small estate. When engaged in making his will, near the time of his death, it seems to have been his purpose to divide his property equally among his children, when James Robinson, his brother, who then had no children of his own, said to him that he need not give his son James W. anything, as he would do as much

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for him as he (Matthew) could do for any of his other children. Whereupon he made no provision for him. James Robinson married again, and recently died leaving issue, to whom he gave all his property, and nothing to complainant.

This bill was filed to make the estate of his uncle liable for the amount complainant would have received of his father's estate, but for his assurance that he should be made equal with the other children, and also to recover for valuable services rendered in the business of his uncle, and articles furnished him upon the same expectation, excited by repeated promises, to the effect that all he had was intended for him at his death. All legal defences are relied upon in the answer including the statute of limitations.

James Robinson died in 1858, leaving all of his property, by will, to others. The complainant was raised by his uncle from early infancy, as one of his family, and, as such, aided in his business. But as to all the claims now set up, after a lapse of more than a quarter of a century, there can be no doubt as to the bar of the statute of limitations, unless an express trust can be raised.

Upon the merits, it may be remarked that it is most probable from the proof, which is not however very explicit and satisfactory, that the uncle gave him much more in his lifetime than his equal share in his father's estate would have been. There can be no pretence but that the uncle's promise was made in good faith, and that it was no part of his purpose to injure his favorite nephew.

What would be the effect of a fraudulent promise of this description, by which an injury or loss resulted, need not now be considered; nor need we stop to inquire whether legal redress might not have been obtained at the proper time for the breach of the uncle's undertaking. The simple question now is, whether a trust was raised against the uncle in favor of his nephew which would continue until his death, and be then capable of enforcement by bill in equity.

We have recently held at Jackson, upon much consideration, in a contest between McClellan's heirs, and the heirs of

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his widow, that a promise by the latter that she would divide the estate equally between his relations and her own, if he left the whole to her; and in consequence of that promise and understanding, the will was so made; a trust was created in favor of the testator's family to the extent of one-half his estate, which a Court of Equity would enforce. 2 Head, 684. But there a benefit was derived from the promise. It was made by a legatee. It caused the will to be made as it was. The trust is based upon a consideration in such a case.

The complainant relies upon two cases in our own reports, and cites no other authority. The first is the case of *McCarty v. Blevins*, 5 Yer., 195. The principle there adopted is that where two persons made a valid contract for the benefit of a third, the latter may sue upon it and recover. If that has any application at all to this case, it would only authorize an action upon such contract, if any existed in law, and not raise a trust. The other case is that of *Richardson v. Adams & Wife*, 10 Yer., 277-9. This is the case of a legatee who prevented the testator from changing his will so as to provide for the surrender to his father of a note held upon him, and which was embraced in the general bequest to his wife, by a promise on her part to do with the note as he requested. But she married again, and recovered judgment on the note. She was compelled to perform the trust, and the judgment was perpetually enjoined and the note cancelled.

The case of *Wickett & Wife v. Roby*, 3 Brown's Par. Cases, 16, is one of the same character, and so is the case in 11 Ves., 638, 3 Atkins, 539, and 2 Vernon, 295. In all these cases, the promises upon which the trusts were raised were made by a person deriving a benefit under the will. We are not aware of any case or authority where a similar charge was imposed upon one, who takes no benefit under the will, by a Court of Equity. We think, therefore, that the complainant in this case has no remedy. We are the less reluctant to arrive at this conclusion against the apparent justice of the case, because we are strongly inclined to believe, from the

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proof, that the complainant has been more than compensated for any loss sustained in his father's estate by gifts made to him by his uncle in his lifetime.

The decree will be affirmed with costs.

ANN E. HAMNER *et al.* v. SAMUEL A. HAMNER, EX'R., &C.

1. **ADMINISTRATORS AND EXECUTORS.** *Retainer of debts. Will. Statute of limitations.* Debts due to an executor or administrator cannot be allowed on the principle of retainer, unless the right is claimed and exercised in a settlement with the County Court within two years. But if the executor is clothed, by the will of his testator, with power to make a settlement of the accounts between them, without limitation as to time, the debts due him are not barred, although the settlement is not made within two years.
2. **WILL.** *Construction. Remoteness.* A gift, by will, to A., upon the death of the testator's daughter "*without issue*," is void for remoteness.

FROM MAURY.

The cause was heard before Chancellor FRIERSON, at the December Term, 1857.

M. S. FRIERSON and R. J. MEIGS, for the complainants.

JOHN MARSHALL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The complainants are the widow and only child of Austin M. Hamner, deceased, and file this bill for an account and

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settlement of the estate of A. M. Hamner, against Samuel A., sr., the executor of the will, and against Samuel A., jr., to have declared void for remoteness a bequest to him.

Austin M. died in November, 1849, and this bill was filed 26th July, 1854. The defendant was qualified, and the will proved shortly after the death. The widow dissented in due time.

The executor returned no inventory of the estate, nor did he make any settlement with the clerk of the County Court.

The bill claims a large amount, and after various decrees and reports, finally recovered \$5,004.97, and both parties appealed.

The loose dealings between the two brothers for a number of years, together with the singular provisions of the will, make the case very complicated and exceedingly difficult to arrive at, and adjust the rights of the parties with any degree of certainty. An approximation to justice is all that can be attained in such cases.

The brothers were particularly attached to, and had unlimited confidence in each other. Their dealings were of eight or ten years duration, and without the evidence of any writings between them to explain their character and extent.

It seems that A. M. Hamner, in 1842, or early in 1843, was reduced almost, if not quite, to a state of insolvency, by his connection with one McQuiddy in the rope and bagging business. In 1843, a very short time after the termination of the rope and bagging concern, he entered into the dry goods business in the town of Columbia, in connection with T. L. McGee, under the partnership name of "McGee & Co." This firm was continued until September, 1844, when he purchased the interest of McGee for less than the capital the latter had paid in, and thereby become owner of all the assets of the firm, except McGee's own, and his brother's and sister's accounts. He also assumed the entire liabilities of the firm. This business he carried on alone until January, 1845, continuing his accounts with his customers in the books of McGee & Co., as if the firm was still existing. Whether any

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profit was made in this business either before or after the dissolution, does not clearly appear. McGee states that the debts of the firm could not have been paid by Hamner, either out of his own, or the means of the firm, and that if he paid them he must have borrowed the money. Yet they must have been paid in some way, as we hear nothing of those creditors, and the retiring partner has not been molested. This business was continued by A. M. Hamner until the 1st of January, 1845, when he sold out the entire stock of goods then remaining on hand, estimated at \$5,141.49, to John H. Ewen, in part pay for a stock of drugs, furniture, fixtures, &c., valued at \$10,833.95, and entered into the drug and apothecary business. Then, or soon after, he took into partnership with him W. T. Hamner, his nephew, the son of S. A. Hamner, and the firm was styled "A. M. & W. T. Hamner." This firm continued until about 1st March, 1847, when the health of Wm. T. entirely failed under consumption, and he sold out his interest to his partner, retired, and soon after died. Of the terms of this partnership, of the sale, or the profits made, we have no information. The business was continued by Austin M. alone, until August, 1849, when he sold out to Polk & Green, for \$6,493—\$2,000 in cash, and the balance in three equal annual payments of \$1,497 each. He made his will on the 30th of October thereafter, and died the next month. The same books, of McGee & Co., were still used in the drug business, and they were not so kept as to show what was made or lost by the firm of A. M. & W. T. Hamner, or A. M. after his purchase of the interest of his partner. There is no doubt, however, but that some profit was made. At the dissolution, they commenced taking steps, to ascertain the state of the business, but the rapid failure of the health of Wm. T., suspended it, and it was never resumed or continued. It becomes important in the case to ascertain, if possible, the interest of Wm. T. upon his retiring from the concern, as defendant, Samuel A., his father and administrator, is entitled to whatever it may have been as his next of kin, he having died without wife or children. This is a full

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history of the business connections and transactions of the testator. His executor has received the assets, which turn out to be a considerable amount, but has demands against the estate for a large amount, both on account of money advanced and as administrator and distributee of his son Wm. T. He proves his advances of money to the testator, by entries on the books of the latter. Before we consider the nature and amount of these demands, it may be well to notice the provision of the will in relation to them, which must have an important bearing on the whole case, in many of its aspects. It is the third clause, and is as follows:

“Whereas, there are unsettled accounts and mutual claims of long standing between myself and my brother, Samuel A. Hamner, both in his own right, and as administrator, and next of kin of his son Wm. T., deceased, my former partner. And whereas, I have the most implicit confidence in the correctness and integrity of my said brother; and whereas, I am desirous that said accounts and claims between us should be settled by my brother Samuel A., inasmuch as our dealings are better known to, and understood by him, than they are, or could be by any other person. Now, therefore, I will and desire that my brother Samuel A., as soon as may be convenient after my death, should take an account of all the matters and dealings between us, running back through several years, and ascertain the amount of my indebtedness to him; all of which will appear from his accounts, but more especially from *my own books*, and that of A. M. & W. T. Hamner; and that he appropriate so much of the means of my estate as may be sufficient to pay off and satisfy the said indebtedness which may be found against me in his favor, both principal and interest.”

The executor having failed to make this settlement, so confidently entrusted to him by his brother, for five years after his appointment, he has been brought into a Court of Equity by this bill, where it must be done for the benefit of those interested in the estate. He claims in his answer, and it is shown by the books of McGee & Co., that in June, 1843, he paid to

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Austin M. \$1,585, which was entered as the capital of A. M., and also as a credit to S. A. Hamner. This must be regarded as a loan to aid in setting up that business. After McGee retired, and the business was conducted by A. M. alone, it appears that other loans or advances of money were made by Samuel A.

These items for loans and advancements to his brother, with the deductions for the current accounts of Samuel A. on the books, are perhaps set forth in the report correctly. And we see no sufficient objection to the amount of assets and disbursements, to authorize any further investigation as to them. And yet we are not able to affirm of the result arrived at in the final decree, whether it is correct or not. But we feel clear that the principle on which the account has been taken is wrong. This will make it necessary to recast it; but, perhaps this may be done upon the material already presented in the report. Of this, however, the parties will judge for themselves.

The account is taken upon the assumption that the partnership of A. M. & W. T. Hamner, still continued until the close of the business, by the sale to Polk & Green, in August, 1859, notwithstanding the sale of W. T., and his death early in 1857. There is no evidence that Samuel A. was ever connected with any part of the business, at any time, as a partner. We have not stopped to inquire what effect this error has had upon the interests of the parties to this suit, but it is certainly a wrong basis upon which to state the account. All we can do now is to settle the principles upon which the account must be taken, and leave the result to be worked out by the figures.

The money advanced by Samuel A. to his brother, at various times during the existence of the firm of McGee & Co., and after McGee retired, as well as the means furnished by him on the purchase of the drugs, in the notes on Littlefield, and in money, then, and after, must be regarded as loans, and not stock, as seems to have been held by the Chancellor. These must be the items of indebtedness referred to in the

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will, and must be paid by force of this testamentary recognition and direction, with interest, after deducting the off-sets appearing on the books, and perhaps correctly set forth in the report of the master. It is only by force of the will that any of these demands can be allowed to the defendant, as they would otherwise, all be barred by the statute of limitations. They could not be allowed to him, either, on the principle of retainer, as we have held that this right is lost, unless exercised in a settlement with the County Court within two years. But the will saves these claims in that respect also, on account of the powers given to the executor to make the settlement himself, without limitation of time. And considering the complicated nature of the business, we would be construing the power and discretion given too rigidly to exclude the defendant's claims so emphatically provided for in the will, on the ground of the neglect and delay which has intervened. He will, therefore, receive a credit for the amount due him, ascertained as aforesaid, for money advanced to the testator. To this will be added the share of the profits of the drug business, to which his son was entitled at the time he sold out and retired. How much this was, it is impossible to ascertain with any degree of accuracy. He furnished no capital, and was young and inexperienced, and very soon lost his health.

It can hardly be presumed that his uncle, who was a physician, and a man of age and experience, would furnish all the capital, and give him half the profits. But it might have been so, on account of the aid he had, and expected to derive from his father Samuel A. Upon the whole, we see no better way to arrive at it, than to fix his part of the profits at \$2,000, as claimed by the defendant in his answer, less the amount of his account upon the books, which is also shown in the report. This being settled, there will be no difficulty perhaps in adjusting the whole matter, by charging the defendant with all the assets, deducting the disbursements in his administration, together with this last item, and that first stated, consisting of the money loaned with interest, *as the will directs*. The

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report of the master furnishes all these items, perhaps, with sufficient certainty to make a final decree here.

The executor cannot be allowed any thing for his services on account of his failure to do his duty in returning an inventory, making settlements, &c.

The item claimed for board will not be allowed, as it is not saved by the will, and therefore excluded upon the principles before stated.

The case also presents a question of construction on the fourth clause of the will of A. M. Hamner. He gives the estate to his nephew, Samuel A. Hamner, upon the death of his daughter "without issue." This is void for remoteness, as it is upon an indefinite failure of issue. 1 Meig's Dig., 972. So the Chancellor held.

A decree will be drawn in conformity with this opinion.

A. C. WHITE *et. al.* v. EMILY WHITE *et al.*

DOMICIL. *What constitutes.* To constitute domicile two things must concur; first, residence, and secondly, the intention of making it the home of the party. A man is presumed to hold his domicile until another is obtained; and to constitute this change the *fact* and *intention* must concur.

FROM GILES.

A decree was pronounced by Chancellor FRIERSON, at the December Special Term, 1859, for the complainants in the cross-bill. The defendants appealed.

WALKER & BROWN, JONES & CLACK, and JOHN MARSHALL,
for A. C. White, *et al.*

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R. J. MEIGS, RICHARDSON, HUGHES, and WARD, for the slaves.

J. M. LESTER and NEILL S. BROWN, for the minors.

W. F. COOPER, S. J., delivered the opinion of the Court.

The original bill in this case was filed on the 31st day of August, 1858, in the Chancery Court at Pulaski, by the brothers and nephews and nieces of A. C. White, deceased; and as his heirs and distributees, against the residuary devisees under his will, to have the said devise, and the accompanying bequest of freedom to the testator's slaves, declared void, and the property, including the slaves, divided among the complainants, as in case of intestacy. The defendants being infants, a guardian *ad litem* was appointed for them, who filed an answer insisting upon the validity of the provisions in the will. At the September Term, 1858 of the Court, the Chancellor ordered the bill to be amended by making the slaves themselves, whose right to freedom was contested, parties defendant, which was done accordingly, and an answer filed for them by next friend, insisting upon their right to freedom under the will. Afterwards, in the month of November, 1859, a cross-bill was filed by the defendants, to the original and amended bills, (the residuary devisees and the slaves,) setting forth all the facts in relation to the execution of the will in controversy, stating that the will had been made and published in the State of Tennessee, had been found by the original complainants among the testator's valuable papers in his office in the town of Pulaski, and taken by them to Bolivar county, State of Mississippi, and there probated upon the ground that the domicil of the testator was in that county, when in truth the testator's domicil at his death was in Giles county, Tennessee. The complainants to the original bill were made parties defendant to this cross-bill, and required to answer its allegations, and answers were filed accordingly. The cross-bill called for a production of the original will, and

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asked that the original, or a copy be probated in the County Court of Giles county, and that the devises and bequests in said will in favor of the complainants in the cross-bill, be declared valid, and enforced for their benefit. Proof was taken chiefly in regard to the domicil of the testator at his death; and, upon the hearing, the Chancellor being of opinion that the domicil of the testator was in Tennessee, and that the provisions of the will were valid by the laws of this State; dismissed the original and amended bills, and decreed in favor of the complainants in the cross-bill, from which decree the original complainants appeal to this Court.

The provisions of A. C. White's will which are the subject of controversy, are as follows:

"After my funeral expenses are paid, and all my lawful debts paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to-wit: I wish all my negroes to be set free at my death, and I do hereby will and bequeath their freedom to all my slaves, of every class and description, which I may possess and own at the time of my death, with this proviso, &c." The proviso related to the contingency of the testator's subsequently marrying and having children, and is immaterial in view of the event, the testator never having married. The will then proceeds: "It is my wish, that after my death my slaves be hired out by the persons hereinafter mentioned, for the space of one year, or until a sufficient sum accrues from such hiring to meet the expenses of their transportation to Africa, and secure their support for the space of six months after their arrival in that country." The will then, after giving certain lands in Texas to two of the testator's brothers, proceeds thus:

"I give, bequeath and devise all the rest, residue and remainder of my real and personal estate, including all I may die seized and possessed of, together with all legal and equitable interests in all goods, chattles, lands or other estate, with the sole and exclusive right to bring suits for such interest, and enjoy the fruits thereof, to represent me as fully and entirely and restrictively in the prosecution of all such interests and

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enjoyments thereof, as I would if alive, to the children of my brother Alfred White, now living, or that may hereafter be born to him, to be equally divided between them, on the condition hereinafter mentioned. I thus give and bequeath all my estate, save and except my negro property and the tract of land above mentioned, to the children of my brother, Alfred White, on this condition: I wish them, after my death, either through themselves or their representatives, to hire out all my slave property, with the exception of a woman named Nancy, now aged about twenty-two years, for the space of one year, or longer if necessary, in order to raise a fund to transport them to the western coast of Africa, and support them for six months after reaching there; and I wish a sufficient sum to be advanced from the moneys that may be on hand at the time of my death, or be earliest collected, to transport the above named woman, Nancy, immediately to Africa, with funds sufficient to support her for one year after her arrival there; it being my will that she be not hired out with the balance of my negroes, but in the manner above specified, sent immediately to Africa. Now, if the said children of Alfred White should refuse to exercise said superintendence in the removal of my slaves to Africa, after my death, then, in the event of such refusal, it is my will that they receive no portion whatever of my property, but that the above bequests to them be null and void." The testator then, in the event of such refusal, expresses his wish to be that the Clerk of the County Court of Giles county, or of whatever county the negroes may be located in at the time of his death, should execute the provisions in behalf of his negroes, and that the property bequeathed to the children of A. White should go to such Clerk.

This will was duly executed by the testator on the 10th day of January, 1857, in the town of Pulaski, and published in the presence of four witnesses, who subscribed the same as attesting witnesses. The testator was then a resident citizen of Giles county, Tennessee, having his domicil in the town of Pulaski, where he had lived many years, in an office which he

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then owned, and continued to own up to his death. He subsequently, on the 29th of October, 1857, departed this life, in Bolivar county, State of Mississippi, under the circumstances hereinafter mentioned, and his will was found by his brothers, the original complainants, or some of them, among other papers, in the office in Pulaski. The will was by them sent to Bolivar county, Mississippi, and, on the 15th day of July, 1858, was presented to the Probate Court of that county, upon the petition of one James Buford, for probate. A commission to take the depositions of the attesting witnesses in Tennessee, was issued by that Court, and upon the proof thus taken, on the 19th of April, 1858, the will was admitted to record, and James Buford appointed administrator, with the will annexed. Afterwards, upon petition to that Court, by the brothers of A. C. White, deceased, to which the residuary devisees under the will were made parties by publication, they being non-residents of that State, and residents of Giles county, Tennessee, the provisions of the will now in controversy were pronounced null and void as contrary to the laws of Mississippi, and the property in that State embraced under such devise, including the negroes in the county of Bolivar, were directed to be divided and allotted according to the statutes of descents and distributions in that State. At the August Term, 1858, of the County Court of Giles county, a duly authenticated copy of the testator's will was presented to that Court by A. C. W. White, one of the testator's brothers, and the same was ordered by the Court to be filed and recorded, and the said A. C. W. White was duly appointed and qualified as administrator, with the will annexed, upon said estate. Shortly thereafter the original bill in this cause was filed.

It is conceded in the argument made to this Court on behalf of the original complainants, that if the domicil of the testator was in the State of Tennessee at the time of his death, the devises and bequests in controversy would be valid. In fact, this result could not be seriously controverted, in view of the repeated decisions of this Court upon similar

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testamentary provisions. But it is insisted that the testator's domicile was, at his death, in Bolivar county, Mississippi, and that, by the laws of that State, such provisions are absolutely void, and the property descends and is to be distributed according to law—that the will being void as to these provisions in the State of the testator's domicile, would be equally void, as to his personal property, in every other State. And we are referred to Miss. Rev. Code, p. 236, § 3; 30 Miss. Rep. 308; 32 Ib. 297, and other authorities. The case has been very ably and elaborately argued by the counsel who addressed the court, and who have filed briefs, and every information has been given which industry and ability could afford. The point most dwelt on, and which it becomes very important to ascertain, is the place of the testator's domicile at his death.

The difficulty of giving a definition of domicile which will apply to all cases, has been often the subject of remark by Judges and writers on international law. The beautiful definition of the civil law is as unexceptionable as any which has been attempted, if we give to the terms used a liberal translation to adapt them to the circumstances of modern times, for it combines precision of language, with poetic imagery. A person's domicile is "*ubi quis larem rerumque ac fortunarum summam constituit; unde rursus non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit;*" where he has his principal home and place for the enjoyment of his fortunes; which he does not expect to leave, except for a purpose; from which when absent, he seems to himself a wayfarer; to which when he returns, he ceases to travel. And yet this definition, beautiful as it is, seems insufficient to meet all the varying phases of the actual, and the Courts have not undertaken to adopt it, or any other. Nor is a definition at all necessary. The general rules which have been laid down for ascertaining the domicile, are universally recognized, and have been often heretofore approved by this Court. "Home, residence, and business, this Court has said, are material elements in the legal idea of domicile." *Pearce v. The State*, 1 Sneed, 66. "A man

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is presumed to hold his domicil until another is obtained ; and to constitute this change, the fact and intention must concur." *Layne v. Pardee*, 2 Swan, 235. And see *Allen v. Thomason*, 11 Hum., 536. "To constitute domicil, two things must concur ; first, residence, and secondly, the intention of making it the home of the party." *Foster v. Hall & Eaton*, 4 Hum., 348. These general principles, cited and admitted by the counsel on both sides, are probably sufficient to enable us to ascertain the testator's domicil in this case, when we come to apply them to the facts developed in the record.

These facts are substantially as follows: The testator, A. C. White, was over fifty years of age at the time of his death. He was born in the State of North Carolina, but had been a resident citizen of Giles county for forty years. He had never married, and had lived for eight or ten years in an office owned by him in the town of Pulaski, taking his meals at a tavern. He was close, economical, eccentric, and reserved. He was litigious and quarrelsome, and had been for years embroiled with some of his nearest relations without any just cause. He had accumulated, however, a very large estate, consisting principally of money, and some seventy-five or eighty negroes, many of them valuable mechanics. He had owned a farm near the town of Pulaski, which he sold during the year 1856. After this sale, he seems to have made some efforts to purchase another place in Giles county, on which to locate his negroes, or a part of them. He, also, begun to entertain the idea of purchasing a Southern plantation, and spoke to one of the witnesses about employing him as an overseer. About the first of the year 1857, he appears to have hired out most of his negroes in Giles county for the year—two or three of his mechanics with the privilege to the person hiring of keeping them from three to five years. A few of his mechanics, he seems to have taken to Memphis, and there hired them. From Memphis, he appears to have gone to Bolivar county, Miss., to look for a place ; and, upon his return home, he wrote to a gentleman in Alabama, who owned a large body of land in that county, to meet him at Elkton, and at the interview,

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which took place in May, 1857, the testator bought the lands, consisting of some seventeen hundred acres, the deeds to which were delivered to him at his office in Pulaski a week or two thereafter. Shortly after this purchase, he seems to have again visited Bolivar county, and to have gone upon the land he had bought. On the 5th of June, 1857, we find him at Memphis, giving a pass to two of his negroes hired at that place, to return to Pulaski. After this date, he returns to Pulaski, and hires the negroes who had been at Memphis, remarking to the person hiring one of them, that he could give his note for the hire when he, White, came back, and he wrote a note and left it with such person to be executed. We next find him in the State of Missouri, where he remained some weeks purchasing slaves to take to his Bolivar county place. He arrived at that place, with the negroes thus bought, ten in number, about the first of October. The place was in the woods, and without any improvements thereon. In the latter part of the month of October, after he had built one log cabin and commenced another, he took sick, and died upon a blanket—there being no other bed clothing nor furniture of any kind whatsoever, to use the language of the witnesses, in the cabin. His office key, and some papers, principally bills of sale for the negroes bought in Missouri, were found upon his person. His office in Pulaski, when entered, after his death was known, contained his bedstead, bed clothing, and other articles of furniture. From one of the drawers in a bureau in this office, the will in controversy and other valuable papers were taken. The testator had, before he left Pulaski, spoken to a mechanic to re-cover his office, and he had left his board bill at the tavern unsettled.

Upon these facts, it could not seriously be argued that there was such a change of residence "in fact and intent," as to transfer the testator's domicil from Tennessee to Mississippi. But, it is said, these facts, coupled with the testator's declarations of intention to make Bolivar county his permanent place of residence, are sufficient to work this result. We do not think so, even if those declarations were far more broad

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and unqualified than they are in reality. The domicile in Tennessee, as we have seen, would continue until another was acquired *amino et facto*. If the declarations relied on had been unequivocal and unvaried, and there were no rebutting evidence, only one branch of the rule would be satisfied. The intent would exist, but not the fact. How can the testator be said to have taken up his actual, permanent residence, when he was only occupying a cabin put up for his negroes, without any preparation for continued residence, when his home, such as it was, of years remained as it always had been, and when the facts demonstrated an intention to return to that home, if for no other purpose than to make such a transfer of his valuable papers and effects as constituted his "cares," the indicia of the principal establishment of such a man? Undoubtedly a permanent removal from one place to another, with intent to make the latter place one's home, would effect a change of domicile, no matter how short may have been the actual residence. But in this case, it is clear there never was any such permanent removal. There was the *animus revertendi*, and the most that can be said, upon the facts supposed, is that the testator may have eventually taken up his permanent residence in Bolivar county. He had not done so at the time of his death.

In truth, however, the evidence relied on is far from satisfactory to the mind, that the testator had any fixed intent to change his domicile. It amounts, at most, to expressions of dissatisfaction with the course of affairs in Giles county, and a determination to invest his means in property elsewhere, and an inclination to spend more of his time in other places. Several of the witnesses speak of his declarations to the effect that he would hire his mechanics at Memphis or Nashville, and spend his time between Memphis and Pulaski. The evidence chiefly relied on consists of statements by witnesses of *impressions* produced on their minds by the language and conversation of the testator, not of the words themselves. Those impressions, it is easy to see, might be readily produced by the testator speaking favorably of his Mississippi purchase, and of

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his intention to settle the place, and to look to it as his chief source of revenue. The proof is clear that he did not intend to carry his Tennessee negroes there immediately, whatever he might do after he had got the place fairly started. The witnesses who approach nearest to direct testimony upon the question of intent, use language which shows that the testator spoke of the place only as a future residence, for the statements referred to were all made before the testator had actually gone upon the lands with his Missouri negroes. Besides, the evidence of the testator's direct declarations that he did not intend to make Mississippi his home, when taken in connection with actual facts as proved, is more conclusive against, than the testimony referred to is in favor of the point in controversy. We are satisfied, after a thorough examination of the record, that the testator had, in fact, no intention to change his domicil.

The result is, that there is no error in the decree of the Chancellor, and the same will be affirmed, with costs.

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TAXATION. *Privileges—how created. Livery stables.* The Legislature, alone, has the power to create privileges and forbid their exercise without a license. The Legislature has not made the keeping of livery stables a privilege, and until it is done by the law making power, that occupation cannot be taxed as such.

FROM MAURY.

Judgment, upon an agreed case, before Judge MARTIN, at the May Term, 1859, for the defendant. The plaintiff appealed.

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N. H. BURT, for the M. and A.

GANTT, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

The question presented upon this agreed case is, whether the plaintiffs had a right to tax the keeping of a "livery stable" as a privilege. They made an ordinance levying a tax of ten dollars "for the privilege of keeping a livery stable." The defendant refusing to pay it a warrant was issued. The Circuit Judge held the ordinance void.

Constitution, Art. 2, sec. 28, provides, that all lands, *town lots, &c.*, shall be taxed according to value. If this were all, no other than an *ad valorem* tax could be imposed upon any lot, no matter what may be erected upon it, or what occupation followed thereon. But in the same section, power is given to the Legislature "to tax merchants, pedlars, and *privileges*."

By section 29 of the Constitution, "the General Assembly shall have power to authorize the several counties and *incorporated towns* in this State, to impose taxes for county and *corporation* purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

What are *privileges*, is a question of construction dependent upon the general law. We have defined it in several cases to be the exercise of an occupation, or business, which requires a license from some proper authority, designated by a general law, and not open to all, or any one, without such license. 4 Sneed, 198; 5 Sneed, 258.

It is a power of the Legislature, alone, to create privileges, and forbid their exercise, without license. They have made the keeping of a tippling house, a race track, &c., privileges, but not livery stables. Until this is done by the law making power, that occupation cannot be taxed, *as such*, any more

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than the keeping of a blacksmith shop, or a lawyer's or doctor's office. This power of creating *privileges*, has not, (even if it could be,) been delegated to this municipal corporation.

This tax was, then, illegal, and the judgment of the Circuit Court is affirmed.

W. H. DUNCAN *et al.* v. H. M. PHILIPS *et al.*

WILL. *Construction of.* In the second clause of his will, the testator gave his wife \$1,000 in money and a negro boy, absolutely; and, also, during her natural life or *widowhood*, all the remainder of his property, both real and personal. The testator, also, provided that his wife should not be required to give bond and security for the forthcoming of said property *at her death*, but that she should have the free use and control of all said property during her *natural life or widowhood*. In the fourth clause he provided that at his *wife's death*, the property should be equally divided between his brothers and sisters, and their heirs, &c. Held, that, by the proper construction of the will, the wife did not take a life estate, in the event she married—that her interest in the property, except the money and negro boy, terminated upon her marriage.

FROM MARSHALL.

The cause was heard before Chancellor FRIERSON, at the February Term, 1859.

W. P. DAVIS and E. COOPER, for the complainants.

GANTT, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed for the construction of the will of Josiah

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Duncan, deceased. Nancy Duncan, the widow, married Horatio Philips, and the question is, whether her estate in certain slaves and other property, terminated thereby, or continued until her death. The Chancellor thought the latter, and the case is brought up for revision.

By the second clause he gave her \$1,000 in money, and a negro boy, Berry, "to manage and dispose of as she may think proper forever." In the same clause, he says:

"I also give and bequeath to my said wife, Nancy, during her natural life *or widowhood*, the tract of land I now live on; also, all the negroes I may die seized and possessed of; also, all my moneys, notes, accounts," &c., &c. "It is my will and desire that my said wife, Nancy, shall not be required to give bond and security for the forthcoming of said property and money *at her death*, but that she have the free *use and control* of all said property during her natural life *or widowhood*, as aforesaid."

In the fourth clause he says:

"It is my will and desire that at my *wife's death*, that my lands be sold and my negroes divided or sold, and that all my other property, except that already specially bequeathed, be sold and equally divided between my brothers and sisters, and half brothers and sisters, and their heirs, with this exception," &c.

We are not able to concur with the Chancellor in his construction of this will. He held that the limitation of her estate to her marriage, must be disregarded, and a life estate given to her without regard to that contingency. This construction is based upon the provision in the second clause, to the effect that she is not required to give a bond for the "forthcoming of the property *at her death*," and the fourth clause, which provides that the sale and distribution of the property or its proceeds among the legatees of the remainder, is to take place "*at her death*," without any reference to the event of her second marriage.

Now, what was his manifest intention? Is no effect to be given to the term "widowhood" twice repeated, as the meas-

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ure of the estate given to her? Can that be disregarded or expunged by construction? Effect must be given to all the parts if they are reconcilable, and not repugnant. To accomplish this, words may be supplied, or even disregarded, where it becomes necessary.

The fourth clause may well stand with the second. All the difficulty arises from the omission of the words "*or marriage*" in the fourth clause, after the words "my wife's death." As framed it only refers to one of the events, provided for in the second clause, as the period of division among others, pre-terminating the other. If she should remain a widow, she is to enjoy the property until her death, and then to go to his brothers and sisters. But if she should marry, what then? That event is to terminate her estate by the second clause; she is only to enjoy the property during "*widowhood*." When the state of widowhood ends, where is it to go? She can hold it no longer, for that is the limit fixed. Certainly to the brothers and sisters. Their right would spring up as well upon the happening of the one event as the other. It was with her to determine which it should be. This must be the construction when the whole will is taken together, and effect given to all its parts. Such must have been his intention. It will not do to strike out the word *widowhood*, as a limit to her estate. It is too important a word to disregard, and its proper force must be given to it. No violence is done to the fourth clause by this construction. It is made to operate upon both events instead of one, and that to carry out the spirit and intention of the testator, as manifested in the preceding clause.

The case of *Hughes and Wife v. Boyd*, 2 Sneed, 512, settles that this kind of a provision in a will is not void because in restraint of marriage. The doctrine and reasoning of that case applies to this, and need not be repeated. There is no distinction in principle between them. This doctrine is not hard upon the widow. She can dissent, and avoid all testamentary restrictions, and stand upon the widow's rights as fixed by the law. Having failed to do this, her rights must be governed by the will. Having chosen to place herself and

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take her rights under the will, she must abide by it in all respects. The election and its consequences are before her when she thinks of changing her condition from that of a widow to a wife. If she prefers the husband to the property, she will marry, and if not she may still enjoy her former husband's bounty. She can not have both blessings, but must choose between them and abide by her election.

We are constrained, though somewhat reluctantly, to reverse the decree in favor of the woman, and remand the case for the execution of the will by the executors, under the direction of the Chancery Court, upon the construction herein given.

GEORGE CONNER v. F. C. ALLEN.

1. **GARNISHMENT.** *Answer of the garnishee. What protects him.* It is the duty of the garnishee to state, in his answer, every fact within his knowledge which had destroyed the relation of debtor and creditor previously existing between him and the defendant. If he fail to disclose a fact, which, if disclosed, would have prevented a judgment against him, he cannot afterwards set up that judgment in bar of a recovery on the debt he owed the defendant, and which he knew had passed into the hands of a third person before he answered as garnishee.
2. **SAME.** *Same. Case in judgment.* O was indebted to A. by note. The note had been transferred to B. by delivery. Judgment was confessed by C. on the note, he knowing that it belonged to B. By mistake, the judgment was rendered in favor of A. against C. The creditors of A. had garnishments served on C., who answered that he was indebted to A. the amount of the judgment, without disclosing the fact that the debt had been transferred and belonged to B. Judg-

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ments were rendered against C. on his answer. Held, that the judgments on the garnishments did not discharge C. from his liability, on the judgment, to B.

FROM MAURY.

Judgment for the plaintiff at the August Term, 1859, MARTIN, J., presiding. Conner appealed.

W. S. RAINEY, for the plaintiff in error.

N. S. BROWN, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

The facts upon which the decision of this cause rests are these: the defendant in error, F. C. Allen, held a note upon Conner, the plaintiff in error, for \$1030, due the 1st of March, 1857. On the 2d of January, in that year—this note being endorsed in blank by Allen, the payee—was discounted by the Lawrenceburg Bank of Tennessee, and the proceeds, \$1017.79, paid to Allen, who from thence ceased to be the owner of the note. On the 26th of February, T. C. Ramsey, the Clerk and Teller of the Bank, by letter, in the name of William Simonton, its Cashier, notified Conner that the Bank held the note, and that it would be due the 14th of March, afterwards. This letter was received and answered by him, by another, addressed to Simonton, of date the 3d of March, 1857, in which he promised that his note should be paid soon. It was not paid, and at maturity was dishonored. Between that time and the 27th of June, Simonton addressed various letters to Conner, to Maury county, where he resided, urging the payment of the note, to which he made answer promising to make payment so soon as he could raise the money. Two of Conner's letters to this effect bear date, the one the 6th of May, and the other the 27th of June. It is, also, probable that

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during this period Simonton had a personal interview with him, in order to collect the note. In August, Simonton again withdrew the note from the Bank for the purpose of suing Conner and effecting a settlement, and placed it in the hands of Allen as the agent of the Bank—that he might go to Maury county, see Conner, and get the money upon it. He left it with H. A. Miller, a Justice of the Peace of that county, in the hope that Conner would pay it by a day named—with instructions that if he did not, the note was to be restored to the Bank. Conner having failed to pay it, Miller, in a letter dated the 18th of August, returned it to Allen, who restored it to the Bank; and Simonton, its Cashier, on the next day, in a letter dated the 19th of August, enclosed it to Miller, with instructions to get Conner to divide it, confess judgments and stay them, and requesting him, when the judgments were obtained, to send him a memorandum of them, and by whom stayed. Conner, accordingly, on the 29th of August, divided the note, executing three in its stead, for \$353.75 each, upon which he confessed three several judgments before said Miller, amounting in the aggregate to \$1061.25, and stayed the same by Martin L. Stockard. Miller immediately sent to Simonton the memorandum required, in a letter dated the 29th of August.

By some mistake or oversight in Miller, the notes and judgments, instead of being to the Bank, their owner, were taken in the name of Allen.

J. M. Moss & Brothers to the use of Samuel H. Jones being judgment creditors of Allen, with a view of subjecting the judgments belonging to the Bank, on the 6th of January, 1858, caused Conner to be summoned as a garnishee, and on that day, upon his answer, obtained judgment against him before Miller, for \$111.66. In like manner, Woods, Bacon & Co., being judgment creditors of Allen to the amount of \$1141.53, on the 13th of January caused Conner to be summoned as a garnishee, and on the next day, upon his answer, succeeded in obtaining judgment against him, in the Circuit Court of Maury county, for \$973.95, the same being the bal-

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ance of the judgments belonging to the Bank, so confessed before said Miller.

Conner, though he knew, as we are satisfied from the proof, that these judgments belonged to the Bank, failed so to state in his answer to the garnishments; but, on the contrary, stated that he owed Allen the amount of said judgments.

The Bank was no party to the proceedings by garnishment, and does not appear to have had any notice of them; and after the expiration of the stay of the judgments, caused executions to be issued, by Miller, upon them, in the name of Allen, to enforce their collection for the benefit of the Bank. This was resisted by Conner, who resorted to a *supersedeas*, and contended that the satisfaction of the judgments upon the garnishments operated as a satisfaction of the judgments belonging to the Bank, in the name of Allen.

It appeared that Conner paid Woods, Bacon & Co., without the issuance of an execution, and that before he would pay them he required a bond of indemnity against the claim of the Bank, which they executed.

The cause was submitted to the decision of the Circuit Court, by both parties, without the intervention of a jury, under section 2956 of the Code, and judgment rendered in favor of the plaintiff below. This judgment we affirm. The debts due from Conner did not belong to Allen, and could not, rightfully, be subjected to his debts. *Johnson et als. v. Irby et als.*, 8 Hum., 654. Notice of the assignment of a chose in action, given to the debtor, either before or after judgment, will vest the absolute title in the assignee. *Clodfelter v. Cox, Adm'r, et als.*, 1 Sneed, 330. If after notice, the debtor take a release from the nominal creditor, or pay him, or procure a set-off against him, or make out an apparent defence in any other way, the whole will be deemed void; and will be so declared either on summary application or upon pleading, or evidence on trial, according to the manner in which the fraudulent act is sought to be enforced. An attorney having a lien on the chose in action, for example, on a judgment for his costs, shall be deemed an assignee. 15 John.

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R., 405; 4 Cowen, 416. So one who takes it merely in pledge, or as collateral security. 20 Johns. R., 142; 9 Cowen, 34.

The assignee will be protected and his right noticed as well in a Court of Law as a Court of Equity; and the mere fact that the name of the person beneficially entitled does not appear in the record, will make no difference, if the debtor have notice of his right. *Burton v. Dees*, 4 Yer., 4, and cases cited above.

If the case now before us were without a precedent, or direct decision, we could have no difficulty in its determination. In principle there can be no distinction between such a case and those above cited. The garnishee must pay the penalty of his own wrong, and cannot avoid liability to the party really entitled, upon the ground that he had paid the debt to another, although under color of legal process. It was the duty of Conner, in his answer to the garnishments, to have disclosed the ownership of the Bank in this fund, and prevented a recovery by the creditors of Allen. A failure to make the proper defence was at his peril, and a payment to them, the same as to a stranger. The Bank was not precluded by the judgments upon the garnishments, because they were *res inter alias acta*. It has been held that a former recovery and satisfaction in the name of an assignor of a note not negotiable, obtained without the privity of the assignee, after the assignment and notice thereof given to the debtor, constituted no bar to a subsequent suit in the name of the assignor, brought by the authority and for the benefit of the assignee. *Dawson v. Coles*, 16 Johns. R., 51. The same principle is settled in *Burton v. Dees*, 4 Yer., 4. And if A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is, notwithstanding, obliged to pay B. again. *Robson v. Eaton*, 1 T. R., 62.

But this question has been often before the Courts of our sister States. In Drake on Attachment, section 630, it is laid down to be the duty of the garnishee to state in his answer every fact within his knowledge, which had destroyed

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the relation of debtor and creditor, previously existing between him and the defendant. If he fail to disclose a fact which, if disclosed, would have prevented a judgment against him, he cannot afterwards set up that judgment in bar of a recovery on the debt he owed the defendant, and which he knew had passed into the hands of a third person before he answered as garnishee. Therefore, where A. was garnisheed in a suit against B., and failed in his answer to disclose the fact, which was known to him, that before the garnishment, B. had applied to the District Court of the United States to be declared a bankrupt, and soon after was so declared; and judgment was accordingly rendered against A. for the debt he confessed to be owing to B.; and afterwards he was sued by the assignee in bankruptcy upon the debt, and set up as a defence the judgment rendered against him as a garnishee; it was held, that having in his answer concealed, or omitted to give notice of a fact which he was bound to disclose, and which would have prevented a judgment against him, the defence was unavailable. So, where, by law, wages due to a person are exempt from attachment, and A. gave to B. a due bill for an amount due him for wages, and, upon being summoned as garnishee of B., answered, admitting the giving of the due bill, but said nothing as to the consideration for which it was given, and was charged as garnishee; it was held, in an action against him by B. on the due bill, that the judgment against him was no defence.

In support of this doctrine, *Nugent v. Opdyke*, 9 Robinson (La.) 453, and *Lock v. Johnson*, 36 Maine, 464; together with numerous other cases, are cited, and among them *Precott v. Hull*, 17 Johns. 284; *Colvin v. Rich*, 3 Porter, 175; *Tompkin v. Phillips*, and *Foster v. White*, 9 Porter 98, 221; and *Stockton v. Hull*, Hardin, 160. These cases furnish direct authority for the judgment of the Circuit Court.

The effect to be given to the garnishee's answer differs, very materially, in the different States. This depends, in a great measure, upon the construction given to the statutory provisions of each State. In most of the States, the answer is taken

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to be true, but is subject to be controverted and disproved; while in others, when its truth is denied, it is held not admissible evidence in the garnishee's favor. Drake on Attachment, secs. 651, 654.

In Tennessee, however, the garnishee's liability is determined solely by his answer, which is held to be conclusive. But this rule has never, to our knowledge, been extended beyond the particular contest between the garnishor and garnishee, and the answer cannot be regarded as concluding other parties—certainly not one who is a stranger to the procedure.

Judgment affirmed.

A. DESPORT v. L. METCALF et al.

ASSIGNMENT. Deed of trust. Evidence. J. made an assignment of his property to M., as trustee. In the deed preference was given to D., who, upon the application of N., the stayor of J., on a judgment included in the deed, but not likely to be reached, made a written transfer of his prior right to satisfaction, in the form of an order to the trustee, to the creditor, on whose judgment N. was stayor. This order was accepted by the trustee, and placed in the hands of the attorneys of the judgment creditor, by N., as collateral security. Held, that such judgment creditor was entitled to the benefit of this transfer; and D. could not impeach it by oral testimony showing that the order or transfer was given conditionally, the same being absolute upon its face, and accepted, by the attorneys, without a knowledge of any conditions connected with its execution.

FROM FRANKLIN.

Decree for the defendants, at the November Term, 1859, before Chancellor RIDLEY. The complainant appealed.

A. Desport v. L. Metcalf *et al.*

PETER TURNEY, for the complainant.

A. S. COLYAR, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

One Jordan, of Winchester, being desirous to secure and prefer a portion of his creditors, on the 27th December, 1857, made an assignment of his property to L. Metcalf, as trustee. Among others, he secured the complainant in a note for about \$900, and placed his debt in the first class. He was also indebted to L. B. Fite & Co. and A. Morrison & Co., by judgments in about the same sum, but they were placed in a position in the deed of trust that the effects assigned would not likely reach. Upon these judgments one R. B. May was stayor. May was importunate for indemnity, and Jordan was anxious to make him secure. The complainant being moved by the appeals of May, and perhaps by the solicitations of Jordan, with whom he was in some way connected in business, or for some other reason, drew up a written assignment and transfer of his prior right to satisfaction, in the form of an order to the trustee, to the said judgment creditors, Fite and Morrison, for the relief of May. This transfer and order was accepted by the trustee, in a writing upon the same, without any condition therein expressed, and handed to May. The latter applied to Frizzell & Colyar, the attorneys for Fite & Morrison, to receive the said transfer, and release him entirely as stayor. This they refused to do, but ultimately agreed to accept it as collateral security, or rather to rely upon that in the first instance, and only resort to him in the event that the trust fund so assigned proved insufficient to satisfy their judgments. Frizzell proves that the judgments could then have been made out of May, but they suspended operations against him, and he sold out his property and moved from the State. On the other hand the complainant insists, and the trustee proves that the transfer was conditional, and only to take effect by the acceptance of it by the attor-

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neys, and the entire release of May from his liability as stayor. That the whole object of it was to release May from the incumbrance of the judgments against him, as they were anxious, as he was about to remove from the county, that he should do so unembarrassed.

The evidence is in conflict on this point, and the rights of the parties must be determined by the face of the paper. It is an unconditional transfer by the complainant of the advantage of his position in the deed of trust to Fite & Morrison, so far as to give them priority over him to the extent of their judgments, for the relief of May.

From what we can see, the trust fund will be sufficient for that purpose; and it is difficult to see how the refusal to release him at once, or ultimately, could affect the validity of the transfer, or defeat the kind objects had in view by the complainant and Jordan.

We must regard the parties as intending to do some effective and substantial thing in the act performed, and the agreement reduced to writing. The substance of it was to secure the payment of the judgments for which May was bound, so as to relieve him. Such is the purport of the instrument, deliberately executed, and it must be performed.

The decree was to that effect, and it will be affirmed.

HUGGINS & RANSOM v. J. A. MOORE *et al.*

1. **CONVERSION.** *Trover. Guardian.* A guardian has only a naked authority, not coupled with an interest, and cannot consent to the conversion of his ward's property, and thereby defeat a recovery in an action of *trover* brought by him for the value of the property.
2. **SAME.** *Same. Same. Case in judgment.* A guardian hired out the slave of his ward to work at a mill, with a stipulation that he was not

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to work as fireman. The hirer worked the slave as fireman, and, also, sub-hired him. The ward sued for a conversion of the slave. Held, that the consent of the guardian, after the hiring, to the conversion of the slave, would not bar a recovery.

3. **NEW TRIAL.** *Practice.* The discretion of a Circuit Judge in granting a new trial cannot, properly, be revised by the Supreme Court.

FROM RUTHERFORD.

Verdict and judgment for the plaintiff, at the March Term, 1859, DAVIDSON, J., presiding. The defendants appealed.

BURTON and HANCOCK, for the plaintiffs in error.

E. A. KEEBLE and PALMER, for the defendants in error.

MCKINNEY, J., delivered the opinion of the Court.

This was an action of trover, for the conversion of a slave. Judgment for the plaintiffs for one thousand dollars damages.

Jordan, as guardian of the defendants in error, who are minors, hired the slave to Huggins & Ransom for the year 1857, who were proprietors of a steam flouring mill. By the terms of the contract, the slave was to work in the mill, but was not "to work or act as fireman." The proof shows, that, on different occasions, the slave was required to act as "fireman;" and that he was *sub*-hired to one Miller for some length of time. There is proof tending to show that Jordan, after the date of the contract, consented to the sub-hiring, and also that the slave might act as fireman.

The Court instructed the jury, that "for either one of these acts, wilfully done, the defendants would be liable in this action, unless the consent of Jordan, upon a *sufficient consideration*, was first obtained." But that, if "after the written contract was executed, and before breach, Jordan consented that the boy should be employed as a fireman occasionally, and also consented that he might be sub-hired to Miller, in neither event would it amount to a conversion."

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The error of this instruction, as argued, is the assumption that a consideration was essential to make the consent of Jordan effectual. This objection cannot be maintained. Although, from the first part of the charge, it might seem that the Judge intended to assert that Jordan's consent would be inoperative unless based upon a "sufficient consideration;" yet, taking the charge altogether, it cannot be so understood. In the afterpart, the Judge, in stating the principle by which the jury are to be governed, drops the idea of a consideration; and from the whole charge it is obvious that this idea is a mere abstraction, not designed to have any practical effect. But if it were otherwise, it would be no ground for a reversal of the judgment. In our view, the question in regard to the consent of Jordan was irrelevant. We are aware of no principle upon which it can be held, that a guardian may consent to the conversion of his ward's property, and thereby defeat a recovery in an action of trover brought by them for the value of the property. We think the guardian is possessed of no such power. With us, a guardian has only a naked authority, not coupled with an interest. 1 Parson's on Con., 114. In this view, the error of the charge was in favor of the appellants.

Another question has been made. There was a former trial and verdict for the plaintiffs below. A new trial was granted, to which the plaintiffs excepted, and a bill of exceptions was tendered and signed, setting forth the evidence and the exceptions, which forms part of this record. We have held on a former occasion, in a case not reported, after a careful examination of the books, that, under our system, the discretion of a Circuit Judge, in granting a new trial, cannot properly be revised by this Court, although in some of our earlier cases, a contrary doctrine seems to have been asserted. But if the rule were otherwise, the question could not be made in the present case, by the defendants in error, as both trials resulted in their favor.

Judgment affirmed.

William Brown v. W. A. Allen.

WILLIAM BROWN v. W. A. ALLEN.

1. **EXECUTION.** *Levy—effect of. Title.* The title to personal property, levied on by an officer vests in him, and he is authorized to sell the same at any time, even after the execution is *functus officio*.
2. **SAME.** *Same. Waiver. Abandonment.* Nothing less than the satisfaction of the debt, or some recognized act of abandonment, or waiver, either by the creditor or officer, could have the effect to destroy the title vested by the levy, or restore the right of property to the execution debtor.
3. **SAME.** *Same. Same. Possession.* Nor does the title which vests in the officer by virtue of the levy depend upon the removal of the property from the possession of the defendant in the execution. It may be left with the defendant, or placed in the custody of any other person without affecting his title. Neither is his title destroyed by taking out an *alias* execution, or an order of sale, or by taking a delivery bond on the *alias*.
4. **SAME.** *Same. Effect of excessive levy.* It is the duty of an officer to levy on property sufficient to make the debt in his hands amply secure against all probable contingencies, but it should not be excessive. Yet, an excessive levy will not vitiate the title of the officer to the property levied on.
5. **SAME.** *Same. Debtor cannot dispose of the property.* The execution debtor cannot communicate title to property levied on to another person, until the levy is discharged by payment of the debt, or waiver, or abandonment.

FROM BEDFORD.

Verdict and judgment for the defendant, at the December Term, 1858, DAVIDSON, J., presiding. The plaintiff appealed.

W. H. WISENER, for the plaintiff.

HENRY COOPER, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

Brown instituted this action of replevin against Allen to

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recover a negro man slave named Perry, then in the possession of the defendant. He failed in the action because of the superior title of the defendant, as found by the jury.

Brown's title was a bill of sale from Rutledge for this and other slaves, dated 21st December, 1857, under which he held possession until some time in January, 1858, when he was taken into possession by Allen.

The claim of Allen was by virtue of a levy of an execution in his hands, as constable, in favor of Mayfield against said Rutledge, for \$193.43, and costs, issued 4th December, 1857, and levied on the same day. It is endorsed on said execution that it was returned on the first of January, 1858, and an order of sale issued. Another slave, named Jim, was included in the same levy. Perry was proved to be worth \$1100 and Jim about \$600, but was afterwards sold for \$450 under other executions. It is said there was another execution in the hands of Allen levied upon said slaves in favor of Connor for \$250. The next day after the levy, the constable informed Rutledge of it, and the slaves were left with him by agreement. When Rutledge sold the slaves to Brown, he obtained his note for \$250, which he paid over to Allen, to be applied to the Connor execution, in his hands.

The jury gave the defendant a verdict for \$1000, as the value of the slave Perry, besides hire and interest, for which execution was to issue in the event the slave was not delivered. This was all released upon the record by the defendant, except \$177.65, and the costs.

The errors insisted upon by the plaintiff for a reversal are supposed to be in the charge of the court.

1. He held that the title which was vested in Allen, the constable, by virtue of his levy, was not lost by leaving the slaves in the possession of the debtor for a reasonable time without any bond for delivery, but it would be otherwise if they remained there an unreasonable time. And as to this the jury were the judges. This is in conformity to our decisions. The title which passes into the officer, by virtue of the levy, does not depend upon the removal of it from the possession

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of the defendant in the execution, but it may be left with the defendant, or placed in the custody of any other person, so far as his right to it is concerned, but his liability to the creditor if it should be lost, would be a different question. This may be looked to as a circumstance to show a waiver, or abandonment, by the officer or the creditor, of more or less force, according to the length of time and other circumstances.

This title of the officer is not destroyed either by taking out an *alias*, or an order of sale. Neither would the taking of a delivery bond on an *alias*, without forfeiture, have this effect. *Evans v. Barnes*, 2 Swan, 294. These subsequent proceedings would be merely nugatory, as the title vested in the officer by the levy would authorize him to sell at any time, even after the execution had become inoperative. *Evans v. Barnes*, 2 Swan, 294. Nothing short of the satisfaction of the debt, or some recognized act of abandonment, or waiver, either by the creditor or officer, could have the effect to destroy the title vested by the levy, or restore the right of property to the execution debtor. If it were not restored to Rutledge, he could not, of course, pass any title to Brown. We think the jury correctly found, under a proper charge, that there was nothing shown in this case to divest the constable of his title.

2. It is insisted that the Court erred in charging the jury that the excessive levy in this case did not render it void. There were other executions against Rutledge; the slaves were liable to die, and it was the duty of the officer to seize property enough to make the debts in his hands amply secure against all probable contingencies. The levy in this case was not *void* on account of the excess, although the value of the property greatly exceeded the debt. Whether the execution debtor might not complain, and be entitled to redress in damages need not be considered, as it is enough for this case to decide that this fact did not prevent the passage of the title to the property out of Rutledge into the officer, for the satisfaction of the executions in his hands. By the levy he became bound for the debt, and was vested with the right to

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recover it, as owner, from any person that might have the possession. Rutledge could communicate no title to Brown, or any one else, until the debt was paid, or the levy in some way waived, or abandoned.

We think there is no error in the case, and affirm the judgment.

JOHN SOALES v. MARK R. COCKRILL.

1. GRANT. *Presumption of. Priority of Possession.* The presumption that the State has parted with her right, by grant, will arise, if there has been a continued and connected possession of the land, without any *hiatus*, for twenty years, without reference to the manner in which the respective possessions are connected or succeed each other: and without regard to the source from which each claims to have derived his title. The presumption arises, although the possession had been by different persons, without any priority of title or occupation between them.
2. SAME. *Same. Character of possession necessary to raise the presumption.* This presumption will not arise unless there is an actual possession of some part of the land, and if held under a paper title designating the boundaries claimed to, this possession would be, by construction, to the limits prescribed by such paper writing.
3. SAME. *Same. Enclosure.* If the possession is not held under an instrument of writing defining the boundaries, the party can only claim title, by presumption, to the extent of his enclosure; but the character of the enclosure is immaterial. It may be a wall, ditch, fence, hedge, or natural barrier, such as a river, bluff, &c., provided the arrangements and improvements made by him evince an intention to appropriate the natural barrier as one of the boundaries of his possession.
4. SAME. *Same. Hiatus in possession.* The fact that the enclosure was at times down, and persons, as well as stock passed over the land, will

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not interrupt or break the possession, if the land were still used and occupied for agricultural purposes, either by cultivation or stock raising.

FROM DAVIDSON.

This case was tried before Judge BAXTER, at the September Term, 1859. The plaintiff appealed.

BOSTICK and DEMOSS, for the plaintiff.

A. EWING, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

The defendant is the owner of a large body of land constituting what is called "Robertson's Bend," on Cumberland river, a few miles below Nashville. The tract consists of various grants of different sizes and numbers, to General James Robertson, dated before the year 1800, from whom the title is derived, passing through various persons to the defendant. That these grants covered the whole Bend, does not seem to have been questioned until 1856, when the plaintiff, ascertaining, as he supposed, that some two or three of these grants did not fit up to each other, but left a strip between them that was still vacant, made an entry upon it for 400 acres. In 1857 he obtained a grant from the State for 200 acres, and instituted this action of ejectment on the 5th day of April, 1859.

The plaintiff failed below, and brings up the case, by appeal in error, for a new trial.

The main ground relied upon for a new trial is, that part of the charge in relation to the character of possession necessary to raise the presumption of a grant in favor of Cockrill for the small slip of land that may not be covered by the

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original grants, and falls within the younger grant of the plaintiff.

The Judge said to the jury on that point, "That after twenty years of continuous, unbroken, adverse possession of land, the law presumed a grant to have issued from the State, and the possessor acquired thereby an absolute, indefeasible title. That this possession might be held by one individual, or, by a succession of persons, and in the latter case, it was sufficient if the several possessions when added together, completed the term of twenty years, provided there was no interruption, no *hiatus*, no intervening time that the land was not adversely possessed by one, or another of the several possessors, and that to connect the several possessions, it was *unnecessary that there should be any written or verbal assignment or transfer from a prior to a subsequent possessor*, but that it was sufficient if the several possessions united in fact, so as to make the possession continuous and uninterrupted from the commencement to the end of the twenty years." He further said, that "The possession must be adverse, that is, under a claim of right, as against the State:" That is, that the persons in possession must claim to be owners of the land, or tenants of the owner.

The objection to the charge is supported by a very plausible argument. It is, that successive possessions cannot be united to make out the twenty years necessary to raise the presumption of a grant, unless there is some transfer, or assignment, or descent by which they are connected. In other words, the argument is, that in order to raise the presumption of a grant where the possessions of several persons must be united to make out the term of years required, they must all be made one, in law, by some privity between them, or the same claim of the land must pass from one to the others by some mode recognized by the law as valid, in the transfer of land.

The charge states the doctrine very broadly; more so, perhaps, than any case we have in our own reports. In *Chilton v. Wilson's heirs*, 9 Hum., 492, there were three, if not four, possessions to be united to make out the term. But they

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were all connected by sales and conveyances, and descent. Yet in that case it is not made a question whether written, or verbal transfers from one to the others were *necessary*. The Court barely hold, that the different possessions may be united, and the presumption of the grant is in favor of the last possession. In *Cannon v. Phillips*, 2 Sneed, 214, the principle laid down is, that possession *alone* is evidence of title, and that its continuance for twenty years without any aid from what is called "color of title," raises a conclusive presumption that it had a legal origin—that is, that it originated by grant from the State. This presumption is arbitrary, to be sure, but it is none the less a fixed and settled rule, founded on the highest public policy, designed to quiet titles and protect occupants of land from molestation. That case places the doctrine entirely upon the continuous use and enjoyment of land for the prescribed time, without regard to the number of persons, or the connection between them.

This particular phase of the question does not seem to have been presented in any of our cases; but we think the true principle is, that, without reference to the manner in which the respective possessions are connected or succeed each other, if they are continued and connected in *fact*, without any *hiatus* for twenty years, each claiming the ownership in connection with his possession, without regard to the source from which each claims to have derived his title, the presumption will arise, that the State has parted with her right by grant. Consequently, any subsequent grant of the same land would be a nullity, and confer no right upon the grantee. What reason is there, to require writings, or even verbal transfers, when the whole doctrine rests upon presumptions in the absence of writings, and its sole object is to supply them for the quiet and repose of society. The law has very wisely fortified the quiet, unsuspecting cultivator of the soil by this and other barriers, against the shrewd, prying speculator, who cares not who is disquieted, or suffers loss, so that he can make gain. Such adventurers must stand upon their strict legal rights, and expect nothing more. But it might be fur-

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ther said, that if such intermediate conveyances or transfers were necessary, they would also be presumed.

To these conclusions we had arrived upon the reason of the case, without any express authority upon the precise point under consideration. But we find that it has been expressly decided in North Carolina, in *Chandler v. Lunsford*, 4 Dev. & Bat. Law R., 409. The Court there held, upon the authority of an older case, of *Fitzrandolph v. Norman*, "that the presumption of a grant arises, although the occupation had been by different persons, and no privity could, by any means, be traced between the successive tenants; much less is it requisite to establish such privity by deed."

There can be no doubt then of the correctness of the charge on this point.

2. It is objected that the possession of this disputed tract was not of such a character as to authorize the presumption of a grant. It is true, that actual or constructive possession is essential. The title by presumption would only extend to the land in actual possession or occupation, and used for agricultural or other purposes. The extent of this possession must be marked by actual use, or by some artificial or natural enclosures. To extend the title by presumption beyond this, there must be some paper designating the boundaries claimed, and then by construction the actual possession of part would be enlarged to the limits prescribed by such paper. In this case there was no paper title perhaps to the slip of land in dispute, as the grants did not join each other, and the defendant must rely upon actual possession. It is said on the part of the plaintiff that this actual possession did not, in fact, exist. This is a controverted question of fact, and there is proof on both sides. The jury has decided it for the defendant, and the verdict must stand, unless there is error in the instructions of the Court in relation to it. It appears in the proof that the whole bend was used for the raising of stock, by pasturage; but some parts of it were cultivated. At the neck of the bend a fence was thrown across from the proximate shores of the river, at no great distance apart, at that

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point. Around the bend at some points there were fences, and at others the bank was adopted as the enclosure, so that the stock could have free access to the water. In reference to this state of facts the Court said :

“It is immaterial as to the architecture of the enclosure, or the material of which it is made. It may be a wall, a ditch, a fence, or a hedge, or it may be some natural barrier, as a river, a bluff, ocean or lake, provided the arrangements and improvements made by him evince an intention to appropriate the natural barrier as the boundary, as one of the boundaries of his possession.”

To this we think there is no exceptions. It is a correct exposition of the law on that subject, in reference to the facts proved. It is true, that the fences were sometimes down, and people, as well as stock, passed in and out. But that would not interrupt or break the possession, if it were still used, and occupied, by the possessors for agricultural purposes, either by cultivation or stock-raising. The jury have found that the whole bend has been in actual possession for the term required to raise a presumption of a grant for any vacant land not covered by the grants, and that of course embraces the portion claimed by the plaintiff, and perfects the title of the defendant for the whole.

This being so, it becomes unnecessary to notice the other point discussed, in relation to the invalidity of the plaintiff's entry and grant, for want of the thirty days' notice to the defendant of the intention of the plaintiff to make the entry.

It follows that the judgment must be affirmed.

P. P. Peck v. James Robinson.

P. P. PECK v. JAMES ROBINSON.

1. **EXECUTION.** *Lien of, relates to its teste.* An execution issued upon a judgment of a Court of Record relates to its *teste*, and binds the debtor's personal property from the time it is awarded.
2. **SAME.** *Lien of executions on justice's judgments.* *Levy. Code.* § 3078. When an execution issued upon the judgment of a Court of Record, and one upon a justice's judgment, are levied on the same personal property, the execution first levied has priority of satisfaction.
3. **SAME.** *Lien. Attachment.* This provision of the Code has no application to a levy under an attachment issued by a justice of the peace, and the lien of a court execution, if of older *teste*, has priority over the lien of such attachment.

FROM FRANKLIN.

Appeal from the judgment of the Court below, rendered at the November Term, 1859, MARCHBANKS, J., presiding.

METCALF, for the plaintiff in error.

A. S. COLYAR, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

At the March Term, 1859, of the Circuit Court of Franklin county, James Robinson, administrator, recovered a judgment against William G. Brooks, for the sum of 1139.05 and costs. On the 18th of August of the same year, an execution was issued on this judgment, and placed in the hands of the sheriff of Franklin county, which he, on the 14th of September, levied upon a carriage and harness as the property of Brooks. This execution bore *teste* from the July Term of the Circuit Court of that year, which was the 4th Monday of the month, and was returnable to the succeeding November Term.

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On the 12th of September, 1859, the plaintiff in error, Peck, caused an attachment to issue against the estate of said Brooks, which, on the day of its issuance, was levied by the said sheriff, on the same carriage and harness. This attachment was issued by, and returned before a justice of the peace of said county, and judgment, on that day, rendered against Brooks in favor of Peck for \$141.55, and costs. On the 15th of September an order of sale was issued on this judgment, and placed in the hands of said sheriff, under which, and the execution aforesaid, he, on the 29th of September, sold the carriage and harness for the sum of \$520.00; which being insufficient to satisfy both judgments, the question is, which is to have priority? The Circuit Judge, upon an agreed case, awarded the fund to Robinson. In this there is no error. It is well settled in our State, that an execution relates to its *teste*, as in England before the passage of the statute, 29 Car. 2, c. 3, sec. 16, which is not of force here, and binds the debtor's goods from the time it is awarded, in whose hands soever they come. The execution in favor of Robinson bore *teste* of the first day of the term from which it issued, and bound the carriage and harness from that time, and overreached the subsequent levy under the attachment in favor of Peck. In a contest between executions from different Courts, the one having the oldest *teste* is entitled to priority. 1 Yer. 291; 7 Yer. 529; 9 Yer. 442. An exception to this common law rule is made by the act of 1846, ch. 72, carried into the Code at section 3078, which provides, that when an execution issued from the judgment of a Court of Record, and an execution from a justice's judgment, are levied on the same personal property, the execution first levied shall have preference. But this statute can have no application to a levy under an *attachment* issued by a justice of the peace, and the lien of the Court execution, if of older *teste*, must prevail over it.

Affirm the judgment.

A. W. Overton v. George C. Allen, Ex'r, &c.

A. W. OVERTON v. GEORGE C. ALLEN, Ex'r, &c.

GIFT. *Act of 1831, ch. 90, § 12.* By the act of 1831, ch. 90, § 12, a *parol* gift of a slave is void; hence, if a slave is hired to a party until called for, but if not called for the slave to be his, he could not hold said slave under this qualified gift, if the donor die without reclaiming him.

FROM DAVIDSON.

Upon the agreed case, Judge BAXTER rendered judgment in favor of the plaintiff, at the May Term, 1859.

R. J. MEIGS, for the plaintiff in error.

A. EWING, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of detinue, brought by Allen, as executor of the estate of A. W. Overton, Sr., deceased, against A. W. Overton, Jr., for the recovery of a slave, named Henderson.

The facts were agreed upon in the Circuit Court, and are as follows: About the first of January, 1855, the defendant, Overton, proposed to his uncle, A. W. Overton, Sr., to hire from him the slave, Henderson, at \$100 a year, for which he offered to give a note with security. To this the former "replied that he wanted no note or security, but that he (the defendant,) might take the negro and pay him one hundred dollars a year for his hire, when he called for it, and to pay no one else; and to keep the negro until he called for him, and that if he never called for him, he was his."

A. W. Overton, Sr, died in July, 1857, without ever having demanded the return of the slave, or claiming payment of hire,

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so far as the proof shows. After his death, possession of the slave was demanded by the executor, which was refused, and thereupon this action was commenced.

Upon these facts, the Circuit Judge held, that the plaintiff was entitled to recover the slave, and gave judgment accordingly.

It is argued that this judgment is erroneous; and, upon common law principles, the argument is unanswerable. Overton having died without reclaiming, or resuming the possession of the slave, the qualified gift became absolute in the donee, as against the personal representative of the donor, and all others claiming merely as volunteers under him. But, by an act of 1831, ch. 90, sec. 12, a *parol* gift of a slave is declared to be "utterly void and of no effect whatever." And this is so, as has been repeatedly held in the construction of the act, as between donor and donee. 10 Yer., 486; 5 Hum., 129.

The gift being absolutely void, and no title having been acquired by an adverse possession, under such void gift, it necessarily follows that the title is in the legatees under the will of the donor. And no objection is made to the right of the executor to maintain the action for the recovery of the slave, for their benefit.

The judgment must, therefore, be affirmed.

W. P. WHITSON v. M. J. GRAY.

1. DAMAGES. *Measure of, resulting from fraud.* To entitle a party to recover damages for a fraud in the sale of personal property, against the vendor, he must not only establish the fraud, but, also, some injury or loss to him as the result of the fraud. Both fraud and injury must exist to sustain the action.
2. SAME. *Speculative. Evidence.* In an action to recover damages for

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a fraudulent representation as to the age of a negro woman, it is not competent, as an element of damage, to show that the woman might have given birth to several children more, if she had been as young as, fraudulently, represented to be. This is too remote and uncertain.

FROM HICKMAN.

Verdict and judgment for the defendant, at the October Term, 1859, WALKER, J., presiding. The plaintiff appealed.

BATEMAN, for the plaintiff.

HUGHES, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

The question in this case is upon the charge of the Court in relation to the measure of damages claimed by the defendant on his plea, in the nature of a cross-action, of fraud in the sale of slaves.

On the 17th of January, 1857, Gray sold to Whitson a negro woman slave and her child for \$1550. The bill of sale recites that the woman was about twenty-five years of age, and warrants the title and soundness. Two notes were given for the price—one for \$550, and the other for \$1000. The first note has been paid, and upon the last, due 17th January, 1858, this suit was instituted, October 4, 1858. The defence relied upon, is a *fraud* in the sale, for which defendant claimed damages by way of recoupment. The fraud consisted in the false representation that the slave was twenty-five years old, when in fact she was twenty-nine and a half, and this known to the vendor. This plea is sustained by the proof. The Court instructed the jury that for this fraud the vendee was entitled to such damages as may have resulted to him therefrom, as an offset against the note. To that point the proof is directed. The witnesses give their opinions as to the difference in value between such a slave of the age of twenty-five

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and twenty-nine and a half years. They vary from one to three or four hundred dollars in favor of the former age. The Court held, that the measure of damages was the difference between the *real value* of the slave of the age she really was, and that which she was falsely represented to be. To this there is no objection. But he further held that the plaintiff might prove that she was worth, with her child, more than the amount given, even if she had been twenty-nine and a half years old, and if only twenty-five, about \$1800. And upon such a state of proof, the defendant would be entitled to no damages, although the fraudulent misrepresentation might be established. He held the law to be, that in order to recover damages against a vendor, it was not enough to show fraud, but, also, some injury or loss to the vendee—that both must concur to authorize a recovery. So we understand the law to be. But still it is insisted that the rule, that the measure of the damages is the difference between the article *as represented*, and *as it was in fact*, applies, in such a case, and confines the vendor to the price paid for the article, as its value, considering it to have been as represented. That is, if such a slave at twenty-five would be worth \$1800, with her child, and if twenty-nine and a half, only \$1550, the vendee would be entitled to recover the difference between these two sums as damages. In other words, if he got them too low—for less than their real or market value, he would be entitled to the benefit of his bargain. The case of *McGavock v. Wood*, 1 Sneed, 184, is cited as authority for this position. That was an action upon a warranty of soundness, and, therefore, in affirmance of the contract. But even in that case, it is held that the price given is only a circumstance to show the *value* at the time of sale, and not conclusive. The case of *Allen v. Anderson*, 3 Hum., 583, is cited to sustain the position. The case in 1 Sneed reverses the judgment, because the Circuit Judge held the doctrine now contended for by the plaintiff in error. The charge in this case conforms to our opinion in that, so far as the same doctrine applies. But that action was upon a broken contract of warranty. This is for a fraud out-

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side of the warranty. Not a fraud in any matter covered by the warranty; not in relation to soundness; but a fraud of the subject of the age of the slave, by which the value was affected. The case is to be considered precisely as if an independent action had been brought by the vendee against the vendor for this misrepresentation. He does not go for rescission, but chooses to retain the slaves, and sue for damages. Then, to what extent has he been injured by the fraud, is the question to be tried. There is surely no way to get at this but to ascertain whether the slave, as represented, was worth less than he gave. If not, he has sustained no loss, but has got the worth of his money, notwithstanding the misrepresentation. It would be a case of fraud, to be sure, but without injury.

The case of *Paxley v. Freeman*, 3 Tenn. R., 51, and Smith's Lead. Cases, 55, with the notes, fully establish the principle laid down by his Honor in his charge, that the gist of the action in this kind of case, is the *damage* sustained by the vendee in consequence of the fraud. Both fraud and injury must concur to sustain such an action. Neither, alone, will be sufficient. This principle has ripened into an axiom in the law.

The evidence complained of was properly admitted, and the rule applied to it in the charge was correct. According to this rule and the proof, the jury properly found that, although a misrepresentation was made as to the age of the slave, no injury resulted to the vendee, and, consequently, there was no damage. It was a case of fraud without damage.

It is again insisted that his Honor erred, in not admitting proof to show, as an element of damage, that the woman in four and a half years might have given birth to several children, and that was a proper matter to be considered in estimating the injury resulting from the fraud. This was properly excluded as too remote and uncertain.

The whole charge of the Court was right upon reason and authority, and the judgment is affirmed.

George S. Shuman *et al.* v. James Clater.

GEORGE S. SHUMAN *et al* v. JAMES CLATER.

PAYMENT. *Presumption of, from settlement.* A settlement with a party for his services for a particular month or other period of time is *prima facie* evidence of payment for all labor or services previously performed by him. To raise the presumption of payment, it is not necessary that there should have been a general settlement of all accounts between the parties.

FROM DAVIDSON.

This cause was tried before Judge BAXTER, at the January Term, 1859. The defendants appealed.

REID and A. EWING, for the plaintiffs in error.

THOS. T. SMILEY and ED. BAXTER, for the defendants in error.

WRIGHT, J., delivered the opinion of the Court.

This is an action of *assumpsit* commenced by Clater against the plaintiffs in error, for work and labor done. He obtained a verdict and judgment in the Circuit Court for six hundred dollars, and upon his releasing three hundred dollars of it, the Circuit Judge overruled their motion for a new trial, and they have appealed to this Court. Shuman, Hitchcock & Co., became the contractors to do the work of certain sections on the Edgefield and Kentucky Railroad, and engaged Clater to clear and roll away the timber, which he done. It was for this work the recovery was had.

The firm of Shuman, Hitchcock & Co., was composed of one Hitchcock, and one of the plaintiffs in error, George S. Shuman, but whether Lawson Tilton, the other plaintiff in error, was also of said firm, does not very clearly appear.

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But, for the purpose of this controversy, we shall take it he was, the jury having so found, and there being evidence to support their verdict. The defence relied upon by the plaintiffs in error in the Circuit Court was, that they had finally settled with Clater, and paid him the entire amount of his demand. Many witnesses were examined on this subject. Hays proved that Shuman paid his hands monthly; did not know that he paid Clater monthly; but he was in the habit, or it was a rule of his, to pay his hands monthly. Cane, an engineer on the road, proved the rule of Shuman to pay his hands monthly, on the 15th of each month, and that they were generally paid, but could not say that he always paid them, or that he paid all of them, or that he paid Clater. Wm. Phillips proved that he and his two sons had worked for Clater in cutting down and clearing away the timber on the road, for which Clater had since paid them; that Clater told him he expected to get the money from Shuman to pay him with; that on settlement day, in March, 1858, he called upon Mr. Tilton with Clater; that Tilton, after examining the account, said to Clater, that he was entitled to \$2.30, and offered to pay him the money; that Clater, with some anger, insisted that he was entitled to more, and refused to take the money offered him by Tilton; that witness understood the parties as attempting to have a settlement for the month last previous to that day; that nothing was said about a final settlement, or any other work than that which had been done in the month last previous. E. S. Cheatham, the President of the road, proved that the railroad company paid Shuman, Hitchcock & Co., monthly, on the 10th day of every month; that this was done to enable them to pay their hands. Wm. Ryan proved that just before Clater left the service of Shuman finally, Tilton called upon him, and borrowed \$40.00 of him; that he said he wanted it to pay off Clater; that he loaned him the money, but did not see him pay it to Clater; that he witnessed, the next morning, a writing which was drawn up by Tilton, and read to Clater three times, and then signed by Clater, or rather he made his mark to it, not being

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able to read or write; that Tilton told witness when he borrowed the money of him, that he intended to discharge Clater; that Clater worked an hour or so the next day, and finally quit. The writing so read and signed was not produced, and the witness was not allowed to speak of its contents, and it does not appear in this record what has become of it. McAndrews proved that he knew that Tilton paid the hands monthly, and that Clater regularly appeared with the others; sometimes he did not appear on the very day, but if not, he came in a day or two. The proof showed that Clater began the work in 1856, and quit in the spring of 1858, and that it was Tilton's business to pay off the hands, for which purpose he kept an office.

There is some other proof in the record, which tends to show that Clater had not been fully paid; but the weight of the entire evidence, in our opinion, is, that he had. Still, if the case rested upon the testimony, the effect which *this Court* is required to give to the verdict of the jury would prevent a reversal.

Whether the judgment is to stand must, therefore, depend upon the charge of the Circuit Judge to the jury. Among other things not excepted to, he instructed them: that a general settlement of all accounts would be presumed to embrace all the dealings between the parties anterior to that date, and it would require proof to show that any item had been left out. That a partial settlement as to a particular transaction, would have the same effect as to that particular transaction, but would raise no presumption as to how the account stood outside of that transaction. We understand this charge, as applied to the facts of this case, to mean, that though a general settlement of all accounts between these parties would create the presumption that all the dealings between them, anterior to that date, had been embraced; yet, that a settlement for a particular month, or other specified period—though it would have the same effect as to that month, or period—would not create any presumption of the payment of anterior demands. So we think the jury must have understood it. This

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charge is erroneous. It is laid down in 1 Greenl. Ev., sec. 38, that a receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rent previously accrued. In Chitty on Contracts, 749, it is said, a receipt for rent due on a certain day, is strong presumptive evidence that the former rents have been regularly discharged. And in *Attleborough v. Middleborough*, 10 Pick., 378, it is held, that a highway tax of one year was not included in a bill for the next, raises the presumption that it was paid. So we think in this case, the settlement with the plaintiff for his services for a particular month or other period of time, was *prima facie* evidence of the payment for all labor or services previously rendered by him to this firm. If the evidence was not sufficient to show a final settlement, there certainly was proof of monthly settlements, even down as late as the month previous to settlement day in March, 1858, which, if left to the jury under a proper charge, might have produced a very different result.

The judgment of the Circuit Court will, therefore, be reversed, and a new trial awarded.

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FRAUD. *Sale of land. Damages.* If a party get up a proceeding for a sale of real estate for partition, fraudulently, which is void, the measure of damages against him is the purchase money with interest.

FROM SUMNER.

This cause was heard before Chancellor RIDLEY, at the September Term, 1859. Both parties appealed.

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GUILD, WINCHESTER and BARRY, for the complainants.

HEAD and TURNER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The various bills, original, amended, supplemental, and cross, with the answers and proof, present this state of facts:

In July, 1851, a petition was presented to the County Court of Sumner, in the name of the five children of Peter H. Martin, deceased, and *James Key*, for the sale of a small tract of poor ridge land, on what is called "Rogue's Fork," of Bledsoe's creek, for partition. The petition states that the said James Key owned one-half of the land, and Martin's heirs the other half. No title is exhibited, no reference to, or report by the clerk, and no next friend or guardian for the minor petitioners. But the Court decreed the sale, fixed the minimum at \$1.25 per acre, and appointed Key commissioner to sell, at either private or public sale. He sold the land, 76 acres, to McLin Key, August, 1851, for \$150, and made his report to the January Term, 1852, when the same was confirmed, but no decree of title.

At the time of the sale, this paper was executed by James Key:

"Received of McLin Key, one hundred and fifty dollars for a certain tract or parcel of land, lying and being in Sumner county, on the waters of the "Rogue's Fork" of Bledsoe's creek, this 4th of August, 1851. I sign as trustee for heirs of Peter H. Martin."

JAMES KEY. [SEAL.]

McLin took possession of the land, and obtaining no title, filed the original bill February, 1857, against James for a specific performance. An amended bill was soon after filed, bringing in the heirs of Martin, and then a supplemental bill to enjoin an action of ejectment instituted by James Key, on the 1st of June, 1858, to recover 20 or 30 acres of the same

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land under a deed from Calgy, made subsequent to the sale to McLin.

James Key, to relieve himself from the unfavorable aspect in which he is presented, says, in his answer, that he employed a very respectable attorney to file the petition for the sale of the land, and that it was not read to him, and he was not aware that the petition stated that he was entitled to one-half of the land; yet, the Martins were indebted to him in matters connected with the land, more than it was worth, and he supposes the attorney knowing that fact, united his name in the petition. He does exhibit a power of attorney dated January, 1850, signed by Robert B. Martin, administrator of P. H. Martin, to "enter upon and take possession of the land for the heirs." And an authority from P. H. Martin, to him, to "rent" the land, dated January, 1849. So it seems he was a sort of agent for the family in relation to this land.

But he shows no authority for filing the petition for sale. It is admitted on all hands, that the sale was utterly void, and that the title is still in Martin's heirs, and the decree restores them to the possession, charging them with improvements, and McLin Key with rents. To all this there can be no objection. But a question arises as to the measure of compensation to McLin. The Chancellor gave him the \$150 on the sale, with interest, against James Key.

It is insisted that it should have been about \$400, the advanced value of the land, because, as it is insisted, the contract of sale was unexecuted, and the case is analogous to an action of covenant on a bond for title. If that was the case, it would certainly be so. It is not controverted that for a breach of an unexecuted contract for title, as in a bond to convey land, the measure of the damages is the value of the property at the time of the breach, 2 Meig's Dig., 616, 721; and that in a suit upon the covenants in an executed contract, as a deed for land, it is the amount paid and interest upon it. 4 Hum., 99. So, if this case could be placed under these rules, the question would be, whether the contract, if any existed, was an executed one, or not. And so it would have to

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be regarded, if valid at all, for any purpose. It is everywhere held, that the confirmation of a report of sale completes the contract, and leaves nothing more for the owners or vendor to do. The Court passes the legal title. And this sale was confirmed, as has been before stated. But this need not be authoritatively decided, and is not, as it is not necessary for the disposition of the case.

But the whole proceedings, sale and all, were void. Nevertheless, James Key acted in the capacity of commissioner in making the sale, under an appointment of a court of competent jurisdiction of the matter. Without fraud, it would not, perhaps, be pretended that he would be liable beyond the money he received and retained, although he acted under a void authority. But if he acted fraudulently, as there is some reason to believe he did in getting up the proceeding, would his liability be different? We are not aware of any authority that would change it in this respect. The sale is a nullity, whether he acted fraudulently, or not, and the injury to the vendee is the loss of his money. There is no breach of covenant—there was none to break. The simple receipt for the money is not a covenant to convey. Where a sale is void for the want of a writing under the statute of frauds, the vendor can only be compelled to refund what he has received. Where a man without authority sells the land of another, and enters into no covenants, but receives the consideration, the measure of damages would be the money received, and interest. It is presumed, that his knowledge, or want of knowledge, that he had no title, would not change the question. The rule so laid down in Sedgwick on Damages, page 200, is applicable to executory contracts, and in cases of fraud makes the vendor liable to the value of the property. We do that without regard to fraud in that kind of contracts. But here there was no contract, and if any, it was executed by the confirmation of the report. We think the Chancellor was right on this point.

He was also right in perpetually enjoining the action of ejectment brought by *James Key v. McLin Key*, and directing the possession to be restored to the Martin heirs. But we

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cannot now pass upon and settle the boundary between the Martin land, and that of Calgy, purchased by James Key. That is a proper question for a Court of Law in an action of ejectment. We do not understand the decree to touch that question, except so far as it prescribes the line to which the Martins shall be put in possession, and that, perhaps, should be omitted in the decree here. If there be any estoppel upon James, it can be applied at law as well as here. Upon that we give no opinion now.

The decree will be affirmed, and the cause remanded for its execution.

ROBERT C. LANE v. NANCY E. CRUTCHFIELD *et al.*

WILL. *Construction of. Descent.* The testator bequeathed his estate to his wife for life, but if she married, she was to give up all the property, to be equally divided between her and his children. She had two children by the testator, and one by a previous marriage. She married in 1850, and died in 1851; one of the testator's children died in 1857. Held:

1. That, by the proper construction of the will the widow was entitled to an estate for life in all the property, in the event she remained single, but if she married, she was entitled to one-third, in fee.
2. Upon her death, her interest in the real estate was cast by descent, equally, upon her three children.
3. Upon the death of the child, his interest in the real estate derived from his father, descended to the child of the whole blood, and his interest derived from his mother, descended to the two children equally.

FROM WILSON.

Appeal from a decree pronounced by Chancellor RIDLEY, at the July Term, 1859.

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JORDAN STOKES, for the complainant.

WILLIAMSON, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

James M. Crutchfield made his will, and died in Wilson county, in 1846, leaving Elizabeth B., his widow, and two children, Nancy E. and Richard T. The complainant is the son and only child of Elizabeth B. by her first husband.

The will, after the payment of all the debts and expenses of administration, gives all his land, slaves and other property to his widow, for her own support and the support and education of his two children, during her life or widowhood. But,

“If she should marry before the death of my children, Richard T. and Nancy E., then, in that event, *all my property to be equally divided* between my wife and my children.” Again, he says, “but if she should marry, then she is to give up the possession of all my property, which is to be divided as above directed.”

The widow intermarried with James Bashaw in June, 1850, and died in October, 1851. Her son, Richard T., died unmarried and intestate, in 1857.

In this state of facts this bill is filed to settle the rights of the parties in view of the events which have happened. This requires a construction of the will. We think the meaning of the testator is plain, notwithstanding a plausible argument is made against our view. At the termination of her widowhood, she was to be deprived of the use and possession of *all* his property, which she was otherwise to enjoy for life; but, as a compensation for that, she was to have one-third of the whole in fee, the two children then being alive, she was to be made equal to her children in the division. Her interest in her equal share was not limited, or in any way qualified. The idea of a life estate is entirely dropped in that event. It cannot be supplied from any thing in the will. There is nothing to show that he intended to give her any less estate than the

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children. "All my *property* to be equally divided between *my wife* and children." If they get a *fee* in their thirds, so must she in her's. The same words apply to both. There is no other part of the will to control the construction.

Then, upon the marriage of the widow, she became owner of one undivided third of the land, as well as other property in fee simple, and Richard, and defendant Nancy, the other two-thirds. At her death in 1851, intestate, her one-third, being then free from the control of the will, would go to her heirs under the statute of descents, to all her children alike, that is, one-third to complainant, and the other two-thirds to her Crutchfield children. This would entitle the complainant to one-ninth of the whole tract, that being one-third of his mother's third. At the death of Richard, his original one-third, under the will of his father, would descend to his sister of the whole blood, to the exclusion of his brother, the complainant, of the half-blood, as he is not of the line of the transmitting ancestor. But as to the one-third of his mother's interest, inherited from her at her death, by Richard, that would go equally to complainant and the surviving sister—that is, each would be entitled to one-half of that ninth. This would, perhaps, be equal to one-sixth of the whole, as decreed by the Chancellor. It would follow, that the complainant would be entitled to one-ninth of the rents from the death of his mother to the death of Richard, and from that time to one-sixth.

The limitation over to Mrs. Williamson is too remote, and, therefore, void. The decree will be in all things affirmed, and the case remanded for its execution.

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JAMES ANDERSON v. THE STATE.

- 1 **EVIDENCE. Presumption. Schoolmaster. Rule as to the onus of proof when a schoolmaster is indicted for an assault and battery.** When the relation of schoolmaster and scholar, or any similar relation is established in defence of a prosecution for an assault and battery, the legal presumption is that the chastisement was proper, and this, to warrant a conviction, must be rebutted by showing that it was excessive, or without any proper cause.
- 2 **SCHOOLMASTER. His power to chastise scholars. Assault and battery.** A schoolmaster has the power to enforce obedience to his rules and to use the rod when necessary, but he cannot chastise wantonly and without cause. His chastisement must be proportionate to the offence, and within the bounds of moderation. If excessive, or without cause, the schoolmaster is guilty of an assault and battery.

FROM COFFER.

The plaintiff in error was found guilty of an assault and battery at the September Term, 1859, MARCHBANKS, J., presiding.

HICKERSON, for the plaintiff in error.

HEAD, Attorney General, for the State.

CARUTHERS, J., delivered the opinion of the Court.

We are asked to reverse the judgment in this case for errors in the charge of the Court. It is an indictment against a schoolmaster for an assault and battery upon one of his scholars. The facts proved to which the charge had reference, are these: The scholar, Wyatt Layne, was a small boy, and had only been at the school one day before this occurrence. The offence for which he was chastised, with some severity, and all the attending circumstances, are thus detailed

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by the first witness, and are not materially varied by the other scholars, who were examined in the case, on both sides.

John M. Gunn, about 15 or 16 years of age, says: "Anderson was hearing a class, and Wyatt Layne spoke out, and said that 'four and one make five,' in a low tone of voice; that Anderson asked 'who it was spoke out?' Layne said 'it was him;' that Anderson called him up, and told him to stand there till he got through his class. Anderson asked him what he spoke out for? He said he spoke before he thought, and commenced crying, and said he would do so no more. Anderson told him to pull off his coat, that no excuse would do. He pulled off his coat. He hit him about a dozen licks, with a switch about as large as his thumb or finger, and two or three feet long; struck him pretty hard, Layne crying all the time. Layne was a small boy, and was never at the school of defendant until the day before the whipping." He thinks that the little boy had never heard the rules of the school. He says further, that Anderson kept a silent, quiet school.

Some of the witnesses think only eight licks were inflicted, and that the boy spoke out loud.

Upon these facts, the defendant was clearly guilty of an illegal act. There was no sufficient cause for the whipping. The offence was very slight, and entirely unintentional. It was the first violation of the rules on the part of the little boy; he was a new scholar, that being his second day in the school, and his apology, repentance, and promise "to do so no more," ought to have saved him from the lash. The chastisement, under these circumstances, was not only cruel, but an unauthorized exercise of power. Cases like this are calculated to produce the deeds of violence against teachers, which so often occur on the part of the parents and brothers of students.

The law has very properly guarded the rights of both parties, where this, and similar relations, exist. The authority given to the teacher must not be abused, but exercised with discretion and moderation. He must, necessarily, have the power to enforce obedience to his rules, and even to use the

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rod when necessary, but not wantonly and without cause. Nor must his chastisements be cruel or excessive, but reasonably proportioned to the offence, and in the bounds of moderation. It is of the first importance that the authority of the schoolmaster should be firmly maintained, but still it must be kept within proper limits. The scholar being helpless, and in the power of his teacher, that power should be restrained, and not allowed to be wantonly abused with impunity. Where this is done, the Courts must afford the proper redress, and prevent the temptation from being presented to parents and relations to take vengeance into their own hands. The government of a school should be patriarchal, rather than despotic. If it be a monarchy, it should be a limited one, and not absolute.

But the claim for a new trial is rested upon a supposed error in the charge. His Honor read to the jury, as the law applicable to the case, the 97th section of 2 Greenl. Ev., and said, in reference to this relation, "if Anderson chastised him, then to justify him, he must, by evidence, establish some misbehavior on his part sufficient to justify the correction given."

Our first impression was that this proposition was erroneous. And so we would still regard it, if it is to be understood as stating the law to be, that the burthen of proving sufficient cause, is thrown upon the teacher, whenever an act of chastisement is established by the State, in order to justify it.

We think the proper rule is, that where the relation of schoolmaster and scholar, parent and child, master and apprentice, or any similar relation, is established in defence of a prosecution of this sort, the legal presumption is, that the chastisement was proper; this must be rebutted by showing on the part of the State, or the proof before the jury, that it was excessive, or without any proper cause. To hold a parent bound to prove that he had good cause to whip his child, or be subject to a conviction upon indictment, would be monstrous. The same rule applies to the relation under consideration.

But we do not understand his Honor to say anything more,

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than that in order to acquit the defendant, it must appear in the evidence before the jury, showing all the facts of the case, that there was "some misbehavior" on the part of the boy "to justify the correction given."

If there had been nothing in the proof before the jury, but the simple fact of whipping, and the relation of the parties, we do not suppose that the able and accurate Judge who presided in this case, would have held, that in order to make out his defence, it would be required that he should show the cause of the chastisement, or that it was moderate. The proof of all the circumstances was before the jury, and it was only intended to instruct them, that the defendant must show in the facts proved, some misbehaviour that would justify him for the punishment inflicted.

Without expressing any opinion on the law as laid down by Greenleaf, in the section referred to, in civil cases, we need only say, that *that*, as well as the passage in charge, upon which we have commented, were only abstractions in reference to this case, as presented in the evidence before them, and could not have prejudiced the defendant. The full case, and all the facts connected with it, were before the jury, and the rules laid down could not have had the effect to mislead them in their conclusions upon the evidence.

Let the judgment be affirmed.

4

JAMES M. AVENT, TRUSTEE, v. THOMAS HORD.

1. **MESNE PROFITS.** *Ejectment. Judgment.* The judgment in an action of ejectment settles the plaintiff's right to recover in an action for *mesne profits* to the date only of the demise laid in the declaration; but the rents and profits may be recovered for the whole time the possession has been wrongfully held by the defendant, unless the statute of limitations is pleaded in bar.

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2. *SAME. Limitation, Statute of.* In an action for *mesne profits*, brought within three years after the termination of the action of ejectment, if the statute of limitation is pleaded, the plaintiff is entitled to recover the rents and profits from the date of the demise laid in the declaration until the possession is surrendered. The recovery is not confined to the period of limitation from the institution of the suit.
3. *SAME. Improvements. Set-off. Code, § 3261.* By the Code, § 3261, permanent and valuable improvements made on land by a party who has been holding possession in good faith and under color of title, may be set off against the rents and profits.

FROM RUTHERFORD.

This cause was tried at the July Term, 1858, before Judge DAVIDSON.

E. A. KELBLE, for the plaintiff.

BURTON and PALMER, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This is an action of trespass for *mesne profits*, after a recovery in ejectment. The plaintiff appealed, and the case is brought up by defendant by writ of error. The pleas were, not guilty, and statute of limitations.

The plaintiff recovered \$590 damages.

On the plea of the statute of limitations, the Court charged that if the suit was brought within three years from the termination of the action of ejectment, the verdict should be against the defendant, and he would be liable for rent from the date of the demise until he surrendered the possession. The defendant insists that this was erroneous, and that the plaintiff could only recover for three years anterior to the institution of the suit. There is no controversy as to the action having been commenced in proper time; that is, in less than three years from the final judgment in ejectment. But the

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question arises upon the extent of the liability where the plea of the statute of limitations is interposed. There is a conflict of the authorities on this subject. There is no doubt but that the plaintiff who recovers in ejectment has a right to demand, in this action, the rents and profits for the whole time possession has been wrongfully withheld by the defendant, unless the plea of the statute is relied upon. The judgment in ejectment settles the right to recover no further back than to the date of the demise in the declaration; but beyond that the title again comes in question, unless proof of it is waived. 2 Arch. N. P. 431; 19 Law Lib., 5th series. Tillinghast's Adams on Eject., 334; 4 Cowan, 329; 2 John. R., 369; 11 John., 405.

All that is very clear, but the question of difficulty is, when the statute is pleaded, can the rents be recovered for more than the period of limitation anterior to the institution of the suit for *mesne profits*?

The action for *mesne profits* is brought after the right to the land is legally established by the judgment in ejectment. It is subsidiary to or consequent upon that action. The one establishes the right to the land adversely held, and regains the possession wrongfully retained, and the other the damages for the use of it. Originally, (and it is still so in some of the States,) the practice was, when the plaintiff recovered the land, to give him at the same time damages to the extent of the profits of the same during the time for which it was tortiously held by the defendant. Tillinghast's Adams, 328. But by our practice, the damages are nominal in ejectment, and a distinct action for the profits must be brought. To this the Code conforms, sec. 3259. In this section, the right to bring this action depends upon the recovery in ejectment. Such was the law before. The right to sue, then, did not accrue until the prior action was determined, and consequently the statute did not begin to run until that time. Therefore it is no bar in this case.

It is true that most of the elementary books, as well as some reported cases, lay it down that the plea of the statute

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limits the recovery to the term prescribed for the bar. All such authorities trace that principle to a sentence in Buller's N. P., 87, where no sufficient authority is cited to sustain it. The question has been more than once before the Supreme Court of North Carolina, and expressly decided against the remark of Judge Buller. 1 N. C. Law Repository, 95; 2 Hay., 381; *Murphy v. Guion*, 2 Murphy, 238.

If the action cannot be brought until recovery in ejectment, it must be very clear that the statute does not begin to run until that time. But it may be said that an action of assumpsit or debt for use and occupation would lie at any time, and therefore the bar applies. This is not so. 4 Yerg., 305. That action only lies upon an implied promise, arising upon an occupation by consent or permission. 1 Arch. N. P., 98; 18 Law Lib. Not where it is wrongful and adverse. Til. Adams, 329. It has been said that the trespass may be waived, and an action brought for use and occupation; but if this be so, it must be limited to the profits accruing antecedently to the time of the demise in ejectment, "for the action for use and occupation is founded on *contract*, and ejectment upon *wrong*; and they are therefore wholly inconsistent with each other when applied to the same period of time; since in the one action the plaintiff treats the defendant as a *tenant*, and in the other as a *trespasser*." *Ib.*

It would seem incongruous to entertain an action for rents when there was no contract, and the land held by adverse claim, before the establishment of his title by the plaintiff in a suit appropriate to that purpose. How could a contract to pay rent be implied when the defendant held adversely? Or would the title have to be tried in a suit for rent? We take it, the proper doctrine is, that the plaintiff, in case of disputed title, and adverse claims, must first settle his right to the land by the appropriate action, before he can sue for the use of it. If this be so, no right of action for *mesne profits* accrues until final judgment in ejectment. Consequently, if this action was brought within the prescribed time from that period, the plea of the statute must be found against the de-

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fendant, and the plaintiff may recover for his possession to the date of the demise, as charged by the Court.

The second error assigned for the defendant is, that the Court refused to allow proof that John Elliott, who conveyed this land in trust to Avent, was to retain the possession and use, until it become necessary to sell it for the purposes of the trust, and for a part of the time at least under that provision, the defendant would be liable to Elliott, and not to Avent, the plaintiff. The Court was right. Avent had the legal title, and successfully asserted it in the action of ejectment. His right to the *mesne profits* would follow, and any questions between him, as trustee, and Elliott, would be a subsequent matter between themselves.

The only error assigned by the plaintiff is, that the Court charged that this was an equitable action, and the defendant had a right to set off against the rents and profits the value of any permanent, valuable, and necessary improvements made by him on the land.

It is argued that the Code, sec. 3259, makes the claim for improvements exclusively cognizable in equity. But sec. 3261 provides that it may be "set off against the rents and profits." This, however, only applies to defendants who have been holding possession in "good faith and under color of title." The Court was not asked to add this qualification, and it is therefore too late now to make the question. The two sections can only be reconciled by holding that the defendant might assert his right to compensation for improvements by bill in equity, or by way of set off at law at his election.

We think neither party is entitled to a new trial, and affirm the judgment. It would seem to us from the proof that the damages are very low, but that was for the jury.

R. Gilbert v. Giles Driver.

R. GILBERT v. GILES DRIVER.

1. **APPEAL.** *Cannot be granted by a Justice of the Peace after two days. Code, § 3140.* By § 3140 of the Code, two entire days (exclusive of Sunday,) after judgment, are allowed for an appeal from a Justice's judgment. After the expiration of the two days, the Justice has no jurisdiction to grant an appeal, and the same should be dismissed.
2. **SAME.** *If granted, and no bond taken. Question reserved.* If the appeal were prayed and granted within the time limited, could the Justice receive a bond for the prosecution of the appeal thereafter?
3. **SAME.** *Interest on affirmance. Code, §§ 3162, 3163.* If a judgment in the Court below is rendered upon an open account, the party is only entitled upon its affirmance to interest at the rate of six per cent. per annum.

FROM DEKALB.

Appeal from a judgment rendered at the ——— Term, 1859, FITE, J., presiding.

COLMS, for the plaintiff in error.

FARE, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a Justice. On the trial, the defendant, Gilbert, set up a cross-demand, exceeding the amount of plaintiff's claim; and the Justice rendered judgment in favor of the defendant for the excess, being \$30.53.

This judgment was rendered on the 15th day of January, 1859; and on the 19th day of the same month—four days after the judgment—the plaintiff, Driver, obtained an appeal to the Circuit Court.

In the Circuit Court, at the first term, a motion was made by defendant, to dismiss the appeal, which was overruled:

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And on the trial, the plaintiff recovered judgment for \$13.46 and costs of suit. From which the defendant, Gilbert, prosecuted an appeal in error to this Court.

The judgment must be reversed. By sec. 3140 of the Code, two entire days (exclusive of Sunday,) after judgment, are allowed for an appeal from a Justice's judgment. After the expiration of the two days, the Justice has no jurisdiction to grant an appeal. If the appeal were prayed and granted, within the time limited, whether the Justice might not receive a bond for the prosecution of the appeal, afterwards, is a question not now presented; admitting that this might be done, it does not help the case of the defendant in error.

The judgment will be reversed, the appeal to the Circuit Court dismissed, and judgment will be rendered here in affirmance of the Justice's judgment, according to secs. 3145, 3167 of the Code. But, as the Justice's judgment in favor of the defendant was rendered upon an open account, he is only entitled, upon its affirmance, to interest at the rate of six per cent. per annum. Code, secs. 3162, 3163.

Judgment accordingly.

EVALINE BROOKS v. JOHN CAUGHRAN et al.

1. **FRAUDULENT CONVEYANCES.** *Conveyance made to defeat alimony, void. Divorce.* If a married woman file a bill for a divorce and alimony, having at the time a sufficient cause for a divorce, and is induced by fraudulent promises to dismiss her bill, and, thereafter, the husband executes a conveyance in order to defeat her right to alimony, the grantee participating in this fraudulent design, the conveyance is void, and will be set aside, as to her.
2. **SAME.** *Same. Cannot stand as security for money advanced.* Where a conveyance is void on the ground of fraud, it is void *ab initio*, and

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will not be allowed to stand as a security to the grantee for advances he may have made, or responsibilities he may have assumed on account of it.

FROM LINCOLN.

This cause was heard before Chancellor RIDLEY, at the August Term, 1859. The defendants appealed.

KERCHEVAL, for the complainant.

J. M. BRIGHT, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor in this case granted complainant Evaline a divorce, *a vinculo*, from her husband, William Brooks. From that decree there is no appeal, and it is not now controverted but that it was correct. The bill under which it was obtained was filed on the 18th of April, 1857. She had before (on the 28th of January, 1854,) filed a bill for the same purpose, but which, through the persuasion and promises of her husband and of the defendant, John Caughran, she had caused to be dismissed.

From an examination of this record, there is little room to question that she was entitled to a divorce, not only at the time of the decree and of the filing of the last bill, but, also, of the first. If so, she had a lawful claim to a fair portion of her husband's estate for her support; and if, after such right accrued, a conveyance of his property was executed by the husband, in order to defraud her of this right, and was received by the grantee, with the same fraudulent design, the conveyance, as to her, is void, and ought not to be allowed to stand as a security for any purpose whatever. As before remarked, Brooks, the husband, does not appeal, and, as to him, the decree is conceded to be right. But the contest

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here is between the complainant and John Caughran, as to a slave, Dick, which he alleges he purchased of the defendant, Brooks, on the 13th of February, 1855, very soon after the complainant had been induced to dismiss her first bill; and whether the same were not taken with the design to defeat complainant's right to a support from her husband's estate? And we are clearly of the opinion it was. Under her first bill, she had succeeded in attaching this same slave, and also one other slave, a note for \$900 upon one Watson, together with other property, when she was induced to dismiss the suit upon the faith of promises made to her, both by her husband and John Caughran, of future kind treatment, and that the property should be settled upon her and her children—her husband being improvident. That they both were instrumental in having the suit dismissed, there can be no question; and just as little, that her husband, in order to effect this end, with the privity of Caughran, if not directly by him, gave her these assurances. But we are also reasonably satisfied, from his answer and the proof, that Caughran, not only carried these assurances from the husband, but that he himself made them to her, stating that he would see that they were executed. But, after she dismissed her bill, they were never executed, but instead thereof, the cruelties of her husband were renewed, the note upon Watson and the other slave was wasted, and a bill of sale taken by Caughran to Dick, under which he claims him by absolute purchase, and he and William Brooks both swear, in their answers, that he had purchased and paid for him, when the truth was—as shown by a cotemporaneous writing, and other convincing evidence—he only held him in mortgage, as a security against a liability for a small bill of costs. Taking the entire record, then, we cannot doubt that both William Brooks and John Caughran concerted the scheme to procure a discharge of the lien upon the property created by the levy of the attachment, in order to enable the latter to get security for a small liability he was under for the former, and with the further motive that both might become gainers by the defeat of com-

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plainant's lien, the purpose of Caughran probably being to make himself the owner of Dick by an unconscientious system of dealing with Brooks, who seems to have been a spendthrift. We think it clear they never intended to make the settlement on complainant and her children. Even if Caughran had not himself directly promised it should be done, it was wrong in him, being privy as he was to what Brooks had done and said, afterwards to take the bill of sale.

The Chancellor permitted it to stand only as a security for the costs. With this, complainant is content; and so should Caughran be: for though, as a general rule, the claims of the husband's *bona fide* creditors, or liabilities properly incurred on his behalf existing prior to an application for a divorce and settlement by the wife, must prevail over the rights of the wife; yet where deeds, like the bill of sale in question, are void, on the ground of absolute fraud, they are to be considered as void *ab initio*, and are not allowed to stand as security to the grantee, for advances he may have made, or responsibilities he may have entered into, on account of them. *Sands et al. v. Codwise et al.*, 4 Johns. R., 537. So that conceding the rule contended for by the counsel of Caughran to be the correct one, which we do, that the mortgagor cannot force from the mortgagee a reconveyance of the mortgaged estate, without a payment, not only of the mortgage debt, but also of any other indebtedness which he, at the time, may be under to him, yet it can be of no avail to Caughran here, because of his actual fraud in taking the bill of sale. Not only so; but it may well admit of question, whether, at the time of the filing of complainant's last bill, or even now, there be any such *bona fide* indebtedness. The note for \$900 upon Watson was given for a tract of land, which Caughran afterwards purchased, and undertook the payment of the note; and it is shown that he and Brooks afterwards had a settlement in regard to it, and though it does not appear in what way a good portion of it was settled, yet it is plausible, at least, to suppose that some of the debts now claimed by Caughran to exist, in his answer, were embraced in that settlement. In

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addition to this, it is positively proved that in several instances since the filing of this bill, Caughran has made payments for Brooks and caused the receipts to be ante-dated to a period anterior to the bill. And besides, there is some reason to believe, that, to some extent, if not entirely, Brooks may have repaid him, out of other assets. A party who thus involves his transactions in so much mystery, in order to affect the just rights of others, ought not to complain, if in the end, he himself is made to suffer.

Decree affirmed.

MARY H. WORTHAM *et al.* v. WILSON CHERRY.

1. **EJECTMENT.** *Deraignment of title—when necessary. Estoppel.* In an action of ejectment where both parties claim title under the same third person, it is sufficient for the plaintiff to prove the derivation of his title from such third person, without deraigning it, regularly. The defendant is *estopped* to gainsay the title of the person under whom both claim to hold.
2. **DEED.** *Sheriff. Tax sale. Act of 1809, ch. 84, § 1.* The power of a sheriff to execute a deed for land sold by his predecessor in office is derived entirely from the statute; and this power, by the express terms of the statute, is restricted to the cases when the "sheriff may go out of office not having executed deeds for land sold by him while in office." In such cases, alone, is the successor empowered to execute the deed.

FROM JACKSON.

Verdict and judgment for the defendant, FITE, J., presiding. The plaintiffs appealed.

Mary H. Wortham *et al.* v. Wilson Cherry.

LOWE, for the plaintiffs.

TURNER and QUARLES, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

The plaintiffs brought this action of ejectment for the recovery of a tract of land of 640 acres, lying in what is now Jackson county; and failing in the action, they have brought the case to this Court by an appeal in error.

The land is granted to James Gillespie, by grant from North Carolina, bearing date May 20th, 1793. The grantee, by his will, devised the same to three of his sons, and a grandson. The devisees, by several conveyances, sold and conveyed the entire tract to Lewis F. Wortham, the ancestor of the plaintiffs, who died intestate in 1842.

In 1846 said tract of land was reported to the Circuit Court of Jackson county, by the tax collector of said county, for non-payment of the taxes of 1845; and judgment was entered that the same be sold. Accordingly, on the 6th of July, 1846, the entire tract was sold to one McCarver, who afterwards, on the 4th of November, 1847, transferred his bid to the defendant, Cherry; to whom, shortly thereafter, the sheriff executed a deed, in pursuance of the tax sale.

On the 23d of August, 1854, several years after the execution of the deed above mentioned, and after the sheriff who made the sale and executed said deed had gone out of office, the defendant procured another deed to be prepared and executed by a *succeeding* sheriff, based upon the same tax sale; and upon this latter deed the defendant relies to establish in himself a legal title to said land—the former deed not being produced. The reason for taking a second deed, as proved by the attorney who prepared it, was that the first one “was not a good deed.”

On the trial, exceptions were taken to the probate and registration of certain of the conveyances executed by the Gillespies to plaintiff's ancestor; but in the view we have taken

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of the case, it is not necessary that we should notice these exceptions. On the other hand, the regularity of the proceedings in the tax sale were impeached; but we are likewise relieved from the necessity of noticing the objections to the validity of said sale.

We place the decision upon grounds different from those assumed in the argument.

1st. In the present case, both parties derive their title from Lewis F. Wortham,—the plaintiffs by descent, and the defendant by purchase at the tax sale. And it is a well established principle in the action of ejectment, that where both parties claim title under the same third person, it is sufficient to prove the derivation of title from him, without proving his title. Tillinghast's *Adams on Eject.*, 248; 2 *Greenleaf's Ev.*, sec. 307. The introduction of the title papers excepted to, was therefore unnecessary, and they will be left out of view. The defendant derives whatever title he may have under Lewis F. Wortham, and is therefore estopped to gainsay his title.

2d. If the proceedings in the report, condemnation, and sale of the land for taxes were admitted to be regular,—contrary to our present impressions,—still, the sheriff's deed relied on by the defendant is of no validity.

The power of a sheriff to execute a deed for land sold by his predecessor in office, is a power derived entirely from the statute. And this power, by the express terms of the statute, is restricted to the case where the "sheriff may go out of office not having executed deeds for land sold by him while in office." In such cases, alone, is the successor empowered to execute the deed. Act 1809, ch. 84, sec. 1.

We need not stop to inquire whether the recital of matters of fact, in the second deed, not authorized by the tax collector's report, would be of any avail. It is sufficient to rest the determination upon the ground that the deed itself—all other objections aside—is a nullity.

In this view of the case, the plaintiffs were entitled to recover the land sued for.

Judgment reversed.

James Cantrell and Wife v. William Colwell.

JAMES CANTRELL AND WIFE v. WILLIAM COLWELL.

1. **HUSBAND AND WIFE.** *When the wife is agent for her husband.* The wife, in the absence of her husband, has an implied authority to take all proper and necessary steps to protect his property from destruction or injury, and the husband is responsible for her acts in the execution of that authority.
2. **SAME.** *Same. Question reserved.* If the wife employs another as the servant of her husband, who wilfully and tortiously commits an injury, by the assent of the wife, or, if she subsequently approve the act of the servant, would the husband be responsible for the tortious act?
3. **MASTER AND SERVANT.** *Master's liability for the acts of his servant.* A master is generally liable to third persons, in a civil suit, for the tortious or wrongful acts of his servant, if these acts are done in the course of his employment in the master's service; and this is so, if the master did not authorize or know of the act, or even if he forbade or disapproved it.
4. **SAME.** *Same. Ratification of servant's acts.* The master is not answerable for the wilful and unauthorized acts of the servant, if they are done, not in the execution of, but altogether aside from the authority given by the master, unless they are subsequently ratified or adopted by him, for his own benefit.

FROM DEKALB.

Verdict and judgment for the plaintiff. FITE, J., presiding. The defendants appealed.

ROBERT CANTRELL, for the plaintiffs in error.

J. C. STONE, for the defendant in error.

MCKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a Justice, against Cantrell

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and wife, to recover the value of a horse beast, the property of Colwell, alleged to have been destroyed by the procurement of the wife, in her husband's absence.

On appeal to the Circuit Court, the plaintiff recovered judgment for fifty dollars.

The material facts are as follows: In September, 1858, the plaintiff's mare jumped over the fence, within the defendant's enclosure. The defendant, James Cantrell, was from home at the time; and his wife, being unable to turn the mare out, requested one John Cantrell, a family relative, who happened to be passing by, to turn the beast out, and he agreed to do so. After trying in vain to catch the mare, and after pursuing her round the enclosure for some time, said John Cantrell threw a rock at the mare and broke one of her fore-legs. No opening was made in the fence for the mare to pass out at, until after the injury was done, when he laid down the fence, and led her out.

The question is, whether, under the circumstances, Cantrell and wife can be made liable for the injury?

So far as regards the authority of the wife to employ an agent to put the mare out of the field, we think there can be no question. Of necessity, it must be held that the wife, in the absence of her husband, has an implied authority, at least, to take all proper and necessary steps to protect his property from destruction or injury.

The case must be governed by the general principles applicable to the relation of master and servant, or principal and agent—for the law, as to both relations, is based upon the same principles and analogies.

A master is generally liable to third persons, in a civil suit, for the tortious or wrongful acts of his servant, if these acts are done in the course of his employment in his master's service.

This rule is one of general application; and it makes no difference that the master did not authorize, or even know of the servant's wrongful act, or that he forbade or disapproved of it. In all such cases the master is liable, provided the act

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of the servant be done in the course of his employment, and within the proper scope of the authority confided to him. The maxim applies, *Respondeat superior*. The master holds out the servant as competent and fit to be trusted, and, in effect, undertakes for his good conduct within the proper range of the authority expressly or impliedly confided to him.

But, it is well settled that the master is not answerable for the wilful and unauthorized acts of the servant, if they be done, not in the execution of, but altogether aside from the authority given by the master; unless they are subsequently ratified or adopted by him, for his own benefit. Beyond the scope of his employment, the servant or agent is, in contemplation of law, as much a stranger to his master as any third person. The master does not undertake for the conduct of his servant beyond the scope of the authority entrusted to him; and, consequently, his wilful and unauthorized acts cannot be regarded as the acts of his master. Blackstone lays down the rule thus: If a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com., 431; *McManus v. Crickett*, 1 East, 106; Smith's Master and Servant, p. 151 to 162; (2 vol. Law. Lib., sixth series.) And the principles apply in the case of principal and agent. Story on Agency, sec. 452, 456.

In the cases upon this subject, some nice distinctions are presented, as respects the question, how far the servant was acting in his master's service, or within the scope of his authority, at the time the injury was done; and though the principle is clear, it is sometimes difficult of application to the facts of a particular case.

The wrongful act of the servant may, in certain cases, be said in some sense to have been done in the course of his employment in his master's service; and yet, in no proper sense, was it within the scope of the authority given him by the master. And, notwithstanding the apparent confusion to be met

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with in some of the cases, the distinction is clearly enough illustrated in the books, between an injury to a third person, arising from the negligence or unskilfulness of a servant, who really had no other purpose, at the time, but the execution of the duty confided to him by his master; and a similar injury, resulting from the wilful and unauthorized act of the servant, not done in execution of his master's orders, but altogether aside from the authority given him, and prompted, perhaps, by his own malice, or wilfulness, or other improper motive.

The distinction is sufficiently illustrated, perhaps, by the case of *Puryear v. Thompson*, 5 Hum., 397, without taking time to refer to numerous other cases upon the subject.

Upon these principles, we think it clear that the present suit cannot be maintained. The request to turn the mare out of the field cannot be tortured to imply an authority, or command, to injure or destroy the animal in doing so. The fair inference would be exactly the reverse of this. The act of violence, by which the loss was occasioned, was not done in execution of the authority given; but was altogether beyond it, and must be regarded as the wilful, wanton, and unauthorized act of the servant, for which he himself, and not the defendants, must be answerable.

It cannot be assumed, upon the proof in this record, that Mrs. Cantrell was present, assenting to the act of violence—whatever effect that fact might have, if established. True, she was at home, in the house; but there is no proof that she assented to, or even knew of the violence resorted to, until afterwards. Whether, if the fact were otherwise, the husband's liability would be affected thereby, we express no opinion.

The supposed subsequent approval of the act of the servant in injuring the mare, by Mrs. Cantrell, is not sufficiently proved; and, if it were, we doubt whether it would be admissible to charge the husband.

The attempt to bring this case within the principle appli-

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cable to the negligent act of a servant, in the course of his employment, is a misconception of the true character of the case.

The judgment is erroneous, and it will be reversed.

M. N. ALEXANDER, ADM'R, &C. v. JOHN C. MARSHALL,
CHAIRMAN, &C.

1. COUNTY CLERK. *How made liable for neglect of the duties of his office. County Court.* It is the duty of the County Court to see that the clerk performs his duties, but if this is not done, and the Court makes an application of money, and employs a third person to perform any part of his official duties, the Court cannot recover the amount thus paid, in an action against the clerk or his administrator. It would be the payment of money to do the work of another without his request or sanction, and the law would not imply a promise to pay.
2. SAME. *Same. Question reserved.* Could the County Court in such case sue the clerk on his official bond, and render him liable for the amount paid out?

FROM MACON.

This cause was tried before Judge FITE. Verdict and judgment for the plaintiff. The defendant appealed.

W. H. DEWITT and Jo. C. GUILD, for the plaintiff in error.

HEAD & TURNER, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

Short was clerk of the County Court of Macon from 1848,

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to his death in 1857. He issued as such clerk, about seven hundred marriage license during his term of office, and failed to record them with the return upon them, as it was his duty to do by the statutes on that subject. He also failed and neglected to record his settlements with guardians and administrators. For which duties thus neglected, he received the fees allowed by law.

The County Court contracted with his successor, Price, to perform the duties so omitted, at an expense of \$206.10. This action of assumpsit was instituted to recover that amount of the administrator of Short. A demurrer to the declaration was overruled, and upon plea and proof, a verdict and judgment were given for the said sum of \$206.10; and the administrator appealed, in error, to this Court.

We think it very clear, that the demurrer should have been sustained. There is no principle upon which the action can be maintained. It was the duty of the County Court to have seen that their clerk performed his duty in this, as well as all other matters pertaining to his office, and visited his failure to do so with such penalties as were appropriate to the case. He should have been removed for such nonfeasance, or culpable neglect of duty. Having failed to do this, or in any way to operate upon him while in their power, we suppose their authority over him was at an end. There is no power on the part of the Court to employ another to do the services that he should have performed, so as thereby to create a valid claim against his estate. It is a case of paying money to do the work of another without his sanction or request, and even after he is dead. The official duties neglected are of importance to the public, and were enjoined both by his bond and his oath; Code, sec, 327, 332 and 4073. If the *County Court* could *sue* at all for his neglect of duty, which is not decided now, it would have to be upon the bond. This remedy would be open to individuals who might sustain injury from this official neglect of duty. It may also be true, that persons from whom money had been taken for services not rendered, could recover it back; and there may be no doubt, but

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that the clerk would be liable to criminal prosecution for extortion. But this suit is not upon the bond, nor by any one who has been injured, but to recover as upon an implied assumpsit for money paid out for the work and labor of another without his request, consent or knowledge. It would probably be proper for the Legislature to pass a law for such cases. But there is now no such law, nor are we aware of any principle that would authorize such an action.

The judgment of the Court overruling the demurrer will be reversed, and the same sustained.

LEWIS BYRD v. JOHN RALSTON.

TAXATION. *Privileges. Tippling. County Court. Railroad Tax.* *Act of 1851-2, ch. 117, § 5.* The act of 1851-2, ch. 117, § 5, makes it the duty of the County Court, when stock is taken in a railroad company, to provide for its payment by levying a tax upon the taxable property, privileges, and persons, by law liable to taxation within the county: which tax shall be levied and paid upon the principle of levying the *State and county tax*. This provision was only intended to restrict the County Court, in levying this tax, to the principle that all property should be taxed according to value; but it does not limit the Court in taxing privileges, to the amount and mode of taxation for State and county purposes. This is left to the discretion of the Court.

FROM GILES.

This was an agreed case before Judge MARTIN, at the August Term, 1859. Byrd appealed.

WALKER & BROWN, for the appellant.

JONES, for the defendant.

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CARUTHERS, J., delivered the opinion of the Court.

The case agreed raises the question whether the order of the County Court of Giles, levying a tax of \$50 on the privilege of keeping a tippling house, for the railroad subscription, was legal. The Circuit Judge thought it was, and Byrd appealed.

It is admitted that this occupation and pursuit is a *privilege*, and that it can be taxed as such; nor do we understand it to be contended that the amount of the tax levied is obnoxious to objection; but it is insisted that the principle on which the Court acted is in contravention of the acts of Assembly on the subject.

The power to levy a tax to meet railroad subscriptions is derived from the act of 1851-2, ch. 117, sec. 5. That makes it the duty of the County Court, where such stock is taken, to provide for its payment, by levying a tax "upon the taxable property, *privileges*, and persons by law liable to taxation within the county; *which tax shall be levied and paid upon the principle of levying the State and county tax.*" This last clause, it is contended, is violated in this case, because the principle adopted is not that established by law for State and county purposes on this particular privilege.

As to the tax on the privilege of tippling, the act of 1846, ch. 90, provides that a tax of \$25 shall be paid to the State, and to the county and corporation each the same amount, or not exceeding that amount, where the "amount" of liquors on hand does not exceed \$250—as to which an affidavit shall be made before the clerk issuing the license. But if the "amount" exceeds the said sum of \$250, then an additional tax of \$10 on each \$100 of excess in value shall be paid. The argument is, that this last provision is not adopted in the present case, and, therefore, the *principle* of levying State and county taxes upon this privilege is departed from. We can not see it in that light.

The restriction in the act of 1851-2 to the principle of State and county taxation, has no reference to a question like

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this. It is only intended to forbid a departure from the principle that all property should be taxed according to value, and no one species of property higher than another, nor that any distinction should be made on account of the particular use that might be made of the property, unless a *privilege* was exercised in connection with it. But it was not intended, because the State tax was to be elevated above the specific amount of \$25, fixed for the privilege, on certain contingencies, that the Court should pursue the same rule in this particular tax. That was left to the discretion of the County Courts.

The Court was content with fixing the amount at \$50, without any enlargement on account of the increased quantity of liquor that might be on hand. It could not be argued, and it is not, that this tax must not exceed the State or county tax. That would defeat the object in view. It might require a tax for double that amount upon property, persons, and privileges, dependent upon the amount needed to meet the subscription.

The judgment will be affirmed.

H. W. Norton v. B. F. Moore.

H. W. NORTON v. B. F. MOORE.

EVIDENCE. *When a witness may give his opinion as to the soundness of a slave.* In an action upon a covenant of warranty of the soundness of a slave, the opinion of a witness as to the slave's condition, founded upon observation and knowledge, is admissible. The witness must first state the facts upon which his opinion is founded, and then he may give that opinion.*

FROM COFFEE.

This cause was tried at the May Term, 1859, MARCHBANKS, J., presiding. Verdict for the defendant. The plaintiff appealed.

B. M. TILLMAN, for the plaintiff.

HICKERSON, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is an action for an alleged breach of warranty in the sale of two slaves—Caroline and Clarissa—made by the defendant to the plaintiff, on the 21st of August, 1856, and judgment being against the plaintiff, he has appealed in error to this Court. He avers, that at the time of the sale and warranty, both of said slaves were unsound—the former in body, and the latter in both body and mind.

At the trial in the Circuit Court, certain portions of the depositions of Sarah Hitchcock, Washington Hitchcock, Washington Wood, William Davis, and S. H. Whitmore were, upon objection by the defendant, excluded by the Circuit Judge from the consideration of the jury. In this it is insisted

* The general rules as to the admissibility of opinions touching capacity, age, &c., are stated, by way of argument, in the opinion.

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there is error, and whether this be so or not, is the only matter for our examination.

Sarah Hitchcock saw Caroline at the plaintiff's house, and in answer to the third interrogatory, states: "When I first saw the negro woman, by examination I found her to be very much diseased; I found her very much prostrated; I laid my hand upon her abdomen, she shrunk from the pressure or from great pain, and instantly coughed up a profuse quantity of matter; her bowels were considerably swollen and very sore, and her bloodvessels were considerably distended and unnaturally full."

The expressions—"I found her to be very much diseased," and, "or from great pain," were excluded; upon the ground, it is said, they were the mere *opinions* of the witnesses, and not a statement of *facts*. It is shown that this witness had opportunity and capacity for observing the condition of this slave beyond most non-professional persons. In *Gibson v. Gibson*, 9 Yer., 329, a case involving the sanity of a testator in the execution of his will, this Court lays down the following rules: "Attesting witnesses, and they only, are trusted to give their opinion merely, and without cause or reason assigned, of testator's sanity. Physicians may state their opinion of the soundness of the testator's mind, but they must state the circumstances or symptoms from which they draw their conclusions. As to all others, their opinions, considered merely as opinions, are not evidence. But having stated the appearance, conduct, or conversation of the testator, or other particular fact, from which his state of mind may be inferred, they are at liberty to state their inference, conclusion, or opinion, as the result of those facts. The propriety of doing this, say the Court, arises from the delicate nature of all investigations into the state of the human mind. How can a witness describe the dissociated and flighty conversation of a lunatic, the fear, the horror, the phrenzy of his eye, how communicate the influences which mind practices upon mind, if he must not speak of inferences, impressions, or conclusions? But that, after all, it is the facts which a witness details, the

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conduct which he describes, which chiefly and primarily constitute the testimony to be relied on."

The reason for the admission of the opinions of witnesses founded upon *observation* and *knowledge*, as applied to a variety of transactions in the affairs of human life, was given by Judge Gaston, in the able opinion of the Court, in *Clary v. Clary*, 2 Ird., 78, a case involving the capacity of the donor to make a deed of gift. The witness there, in that part of his deposition which was rejected by the Superior Court, stated, "that he was impressed with the belief that, as to her mental faculties, Mary Clary was in the state called childish." The substance of the entire deposition was, that the witness had no acquaintance with Mary Clary, (the donor,) other than such as resulted from one occurrence; that eleven years before the execution of the deed in dispute, he visited her at Daniel Clary's house, in consequence of a message from said Daniel, and for the purpose of writing her will; that he received her directions with respect to the disposition of her property, and wrote the will according to these directions; that he did not attest the will, but left it to be attested by others; that at this time she appeared to him to be in good health, but he thought her intellect in the state usually termed childish. The objection to the rejected part of the deposition was, for that it gives the *opinion* of the witness upon the state of Mary Clary's mind. The judgment of the Superior Court of Law rejecting this evidence, was reversed, the Court holding, that whatever might be the weight of the rejected testimony, the plaintiffs had a right to insist on its being placed in the scales of evidence. Mere opinion, say the Court, as such, is not admissible. But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others, is more than mere opinion. It approaches to knowledge, and is *knowledge*, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal obser-

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vation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others. The cases of *McKee v. Nelson*, 4 Cowen, 355, and *Morse v. The State*, 6 Cow., 9, went upon the same ground. The former was an action for a breach of marriage promise, and it was held, that a witness might be asked his opinion, whether living with the plaintiff, and from an observance of her deportment, &c., he is of opinion that the plaintiff was sincerely attached to the defendant. The latter involved the question, whether a student of Yale College was under the age of 21 years; and it was held, that had the witnesses testified to the facts indicative of the student's age, and accompanied them with their belief, or opinion, the testimony would have been competent. The proof is admissible in a certain class of cases, because it is impossible, says Judge Gaston, for the witness to specify and detail to the jury all the minute circumstances by which his own judgment was determined, so as to enable them, by inference from these, to form their judgment thereon.

We do not perceive why these principles are not applicable to a case involving physical as well as mental unsoundness; and so we understand the authorities. 1 Greenl. Ev., sec. 440; 11 Hum., 268.

Testing the case by these authorities, we think the witness, Sarah Hitchcock, from the facts detailed by her, was qualified to give her opinion, and might state that she found the slave very much diseased, and that when she laid her hands upon her she gave way, either from the pressure, or from great pain. Indeed the testimony of this witness can scarcely be regarded as that of a non-professional person. She was called by the plaintiff to attend this slave as a physician, and examined her in that capacity, and charged for her services as do other physicians. She had attended to diseases peculiar to females for the last twenty-six years, and had an active experience in such diseases for that length of time, aided by reading, and by intercourse with the best physicians, and was then

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actually practicing as a physician. She not only states the circumstances, or symptoms, contained in her answer to the interrogatory above named, but details other facts tending to show the diseased condition of the slave.

Upon the same authority, it seems to me, there was error in rejecting those parts of the deposition of Washington Hitchcock, wherein, speaking of the slave Clarissa, he says: "She was, at the time I first saw her, and is now, almost, if not quite an idiot;" also, the words, "and seems not to understand what is said to her;" and also, "she seems to have no care of herself, or sense of protection."

— This witness was the plaintiff's overseer in the fall of 1856, and had charge of his slaves; and the entire sentence of the deposition from which the above extracts are taken, is as follows: "She was, at the time I first saw her, and is now, almost, if not quite an idiot. When she is spoken to, she stands still, and seems not to understand what is said to her. If she is ordered to do anything, if she goes at all, she is as apt to do anything else as that which she was bid to do. She seems to have no care of herself, or sense of protection. She sleeps a great deal, and it seems would sleep always if she was not roused up." Now here the opinion of the witness is accompanied with the *conduct* of the slave.

— But as to the other parts of the depositions of these two witnesses which were rejected, as well as the rejected proof of the other witnesses, we are not able to see that there was any error, either because it was but *mere opinion*, unaccompanied with the facts, or upon other grounds, was inadmissible. It is often a difficult matter, in this class of cases, to determine what is, or is not, legal evidence. We have felt the embarrassment of the subject in this cause.

It may be that the rejection of the evidence which we now consider admissible and material, resulted in no injury to the plaintiff; but as we cannot see what effect it might have produced if allowed to go to the jury, we are constrained to reverse the judgment, and remand the cause for a new trial. We do so with less reluctance, because, from reading the

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entire proof, we think, as to the slave Caroline, the weight of it is, that she was unsound at the time of the sale and warranty.

Judgment reversed.

FALL & CUNNINGHAM v. JOHN Y. ROPER, SR. *et al.*

1. **REGISTRATION.** *Certificate of probate—what it must contain.* The omission, by the clerk, in the certificate of probate of a deed, of the words, "the within named," and "with whom I am personally acquainted," is *fatal* to the probate. It is one of the most important requirements as a protection against fraud contained in the formula prescribed by the statute, and cannot be dispensed with.
2. **SAME.** *Same.* *Act of 1846, ch. 78.* The words, "with whom I am personally acquainted," being a matter of substance, their omission does not fall within the provision of the act of 1846, ch. 78.
3. **SAME.** *Same.* *Correction of probate. Code, §§ 2081, 2083.* The Code provides that the Clerk, on the application of the party interested, may correct any mistake or omission of words in his certificate, and the Register shall record the correction in the proper book of his office, and make a reference to the same on the margin opposite to the original registry of the certificate. This provision of the Code is not retrospective in its operation.
4. **SAME.** *Same. Same. Question reserved.* As to deeds executed after the passage of the Code, can a defective probate which has been corrected, be regarded as effectual, as against intervening lien, beyond the date of its correction?

FROM MACON.

Decree by Chancellor RIDLEY, for the defendants. The complainants appealed.

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HEAD & TURNER, FITE & ALEXANDER, for the complainants.

GUILD and BENNETT, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an attachment bill, filed on the 4th of May, 1858. The complainants are creditors of the defendant, Martin, and they seek to obtain satisfaction of their debt out of certain land and slaves conveyed by Martin to Roper. They claim this relief upon two grounds: first, that the conveyances are void as to creditors, for fraud; and secondly, that the probate and registration of said conveyances are of no effect.

It appears that both deeds were executed on the 27th of April, 1858, and on the same day were acknowledged before the Clerk of the County Court of Macon, by defendant, Martin; and registered in the Register's office of said county.

In each certificate of probate the words, "the within named," and "with whom I am personally acquainted," were omitted by the clerk. Afterwards, on the 8th of February, 1859, pending this suit, the clerk was procured to supply this omission, pursuant to secs. 2081, 2083 of the Code.

This omission is fatal to the probate. It is one of the most important requirements—as a protection against fraud—contained in the formula prescribed by the statute.

But it is insisted that the defect is cured. We do not think so. By the act of 1846, ch. 78, the omission of words in the certificate of probate did not vitiate, provided "the substance of the probate" required by the act of 1831 was contained in the certificate. Under this act the validity of the certificate must be judged, as it was prior to the Code.

The Code provides that the clerk, on the application of the party interested, may correct any "mistake or omission of words," in the certificate. Sec. 2081. "And the Register shall record the correction in the proper book of his office, and

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make a reference to the same on the margin opposite to the original registry of the certificate." Sec. 2083.

The acknowledgment of the deeds was taken by the clerk before the Code went into operation. But it is argued, that by the proper construction of the latter section, the correction, when made, necessarily relates to, and incorporates itself with, the original probate, so as to give it effect from its date; and that, in this view, it matters not that the probate of the deeds was prior to the operation of the Code.

We do not concur in this construction. The provision of the Code was not intended to be retrospective, or it would have been so expressed. It was designed to apply only to future cases. And even as to such cases, the question will be found not free of difficulty, whether, as against intervening liens, the probate can be regarded as effectual beyond the date of its correction. The language of sec. 2083, perhaps admits of no other fair interpretation, than to dispense with the necessity of a second registration of the deed; and not, by relation, to make the deed operative from the date of the registration upon the invalid probate. But, however this may be, it is clear that the present case does not fall within the provisions of the Code.

The result is, that the lien of complainants attachment must prevail; and this is decisive of the case, without noticing the question of fraud.

The decree will be reversed, and a decree rendered for complainants.

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MARTHA A. GUPTON v. ABNER GUPTON *et al.*

WIDOW. *What the widow takes when she dissents from the will. Code, § 2409.* By the Code, § 2409, where a satisfactory provision, in real and personal estate, is not made for the widow, by the will of her deceased husband, she may, within one year after the probate of the will, *dissent* therefrom; and be *endowed* as if her husband had died intestate. The use of the term *endowed* does not limit the estate to be taken by the widow to one-third of the land, but embraces the personal estate, and the widow is entitled to such portion of her husband's property as she would have been, had he died intestate.

FROM CHEATHAM.

This cause was heard before Judge PEPPER, sitting as Chancellor, at the October Term, 1859.

ROBB & BAILEY, and MEIGS, for the complainants.

GARNER, HOUSE and LOWE, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The complainant is the widow of Abner Gupton, sr., who died in Montgomery county, in August, 1859, the owner of 10,000 acres of land, supposed to be worth \$200,000, about one hundred slaves, a large sum of money, and other personal property. He made his will, from which the complainant dissented, in proper time. The deceased had no children by the complainant, but several by a former wife—perhaps as many as five.

She filed this bill to obtain dower in the land, and a *distributive share of the personal estate* of her husband.

By demurrer to the bill, the question is raised as to her right to any part of the personalty. This depends upon the construction of the Code, sections 2404 and 2429.

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The last section embodies the then existing laws, and constitutes the "statute of distributions," in cases of intestacy. According to that, the widow, when there are children, which is this case, is to take a "child's share." But this is not a case of intestacy, and therefore must be governed by section 2404, which is :

"Where a satisfactory provision, in *real or personal estate*, is not made for her she shall signify her dissent, in open Court, within one year, after the probate of the will," in which case, *she shall be endowed as if her husband had died intestate.*"

The part of the act of 1784, which extended her right, in *such a case*, to a child's part of the personalty, is omitted, either by mistake or because it was intended by the use of the word *endowed*, to cover and secure to her the provision of the old act. We are bound, however, to seek the intention of the Legislature, through what they have written, and enforce that. But, in the construction of their language, we must necessarily, in cases of ambiguity, look outside of the letter, and the technical meaning of words, as well as their literal import, to the subject matter and object in view, to ascertain their purpose and intention. It cannot be presumed, by any one, that it was *intended* to allow the widow nothing, in cases of dissent, but her dower in the land. That would enable her husband to deprive her of any part of his estate, in case he left no land, although he might be worth a million in money, stocks, or other personalty.

This would be the inevitable consequence, if the word "endowed" should be construed as a technical term, and confined to the act of assigning "dower." But the word *endow* is not so limited in its meaning. Webster and Richardson, in their Dictionaries, define it thus: to give; to bestow; to furnish with a portion of goods or estate; to settle on, as a permanent possession; to furnish with a permanent fund or property. The old marriage ceremony of England concluded with the words, "with all my worldly goods I do thee endow." It is the word applied to the provision made or fund set apart

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for the support of literary and charitable institutions; as when we say a college, or hospital is "endowed."

So, we see, that the word *endow*, or *endowed*, is not limited to the technical sense of giving "dower." It has a larger scope than that. To what it shall extend, then, is a matter of construction in reference to the object for which it was used, and the connection in which it is found.

In this section, it must mean something more than a provision out of real estate. If it did not, as we have before stated, the privilege of dissenting would not benefit the widow where the husband's estate consisted only of personalty. But she is allowed to resort to her legal rights, in despite of the will, where *satisfactory* provision is not made for her out of the real or *personal* estate. It was intended to secure to her an election between the provision made for her by the law of her husband, and the law of the land. It was intended that he should not have the power to deprive her of a just and proper share of an estate which she may have aided in building up. She has a right to stand upon the law, and participate in his estate, whether he is willing or not. We will not defeat that right, and render this provision nugatory, unless we are compelled to do so.

We have, in several cases, given this word, and even the word *dower*, in deeds, the enlarged signification.

We have no idea that the Legislature intended, by this section, to do so absurd a thing as to exclude the dissenting widow from all interest in the personal estate, and confine her to a mere life estate in a third of his land, if he should, fortunately, have any. It cannot be supposed that, in pretending to place her on the high ground of independence of her husband's will, in regard to the part of his estate allowed her by the laws of the land, she should be tied down to a technical dower in the realty.

We have no difficulty in expounding, and that upon sound reason and authority, the word "*endowed*" so as to embrace the personal estate, and allow her to participate in that, ac-

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cording to the section for the distribution of intestates' estates.

It is not now necessary to meet the strong case put in argument, of a man dying without children, in which, by the recent law, in cases of intestacy, the widow takes the whole personal estate, because, in cases where there are no children, the act of 1784 and the Code are the same in cases of dissent. When such a case arises, and it never may—as we understand the present Legislature have made an amendment of the law on the subject—it will be time enough to consider whether it shall be governed by the act of 1784 and subsequent acts, limiting her rights to a part, or the more recent enactment giving her the whole.

The judgment of the Chancellor, overruling the demurrer to the widow's bill, is therefore affirmed; and the case will be remanded for such proceedings as will put the widow in possession of her rights, as we have herein disclosed them.

ANDREW REED v. WILLIAM REED *et al.*

1. **HUSBAND AND WIFE.** *Tenancy by the curtesy. Remainder and reversion.* A man cannot be tenant by the *curtesy* of a remainder or reversion expectant upon an estate of freehold.
2. **SAME.** *Same. Dower.* If a woman, on whom lands descend, endow her mother, afterwards marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the *curtesy* in those lands whereof the mother was endowed—because the daughter's *seizin* was defeated by the endowment.

FROM BEDFORD.

This was an appeal, by the petitioner, from the County Court.

Andrew Reed v. William Reed *et al.*

J. H. NEIL, for the appellant.

E. & H. COOPER, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

William Cootes died intestate, leaving a widow and several children. He was seized of a tract of land in Bedford county, out of which his widow, Celia Cootes, was endowed, and in possession of which dower she remained until her death, in 1857.

The petitioner, Andrew Reed, married one of the children of William Cootes, and she survived her father, but died before the death of the said Celia, leaving several children surviving her, who are also the children of petitioner, and born after the death of William Cootes.

The question is, whether Andrew Reed is tenant by the curtesy of his wife's share in the lands which were assigned to Celia Cootes for her dower? This question we answer in the negative. A man cannot be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless the particular estate be determined during the coverture. Neither can he be tenant by the curtesy, of lands which are *assigned* to a woman for her dower. If a woman, on whom lands descend, endows her mother, afterwards marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed—because the daughter's seizin was defeated by the endowment. 1 Greenleaf's Cruise on Real Property, Title Curtesy, chap. 2, secs. 23 and 25, and Title Dower, chap. 2, §§ 20, 21, 22 and 23.

The County Court so held, and we affirm the decree.

Mary A. Alexander *et al.* v. Norman Walch.

MARY A. ALEXANDER *et al.* v. NORMAN WALCH.

1. **WILL.** *Construction.* *When persons take as a class.* If the bequest in a will, of a remainder, is as explicit as to the persons who are to take, as if they were named, the remainder vests, as it would have done if the parties had been named, and they do not take as a *class*.
2. **SAME.** *Same.* *Case in judgment.* The will contains the following clause: "I give to my sister, Nancy, all my landed estate and negro man, named Abe, and a negro boy, named Stephen, during her natural life, then to be sold and equally divided amongst my sisters and brother. Held, that the remainder vested, and the sisters and brother did not take as a class.

FROM WILSON.

This cause was heard before Chancellor RIDLEY, at the July Term, 1859. The complainants appealed.

JORDAN STOKES, for the complainants. .

MARTIN and GUILD, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This case involves the construction of the will of James Walch, made in 1835.

"I give to my sister, Nancy, all my land estate, and negro man, named Abe, and a negro boy, named Stephen, during her natural life, then to be sold and equally divided amongst my sisters and brother." The testator had no parents living, nor any wife or children, and only two sisters, besides the said Nancy, and one brother. Nancy died July, 1858. Margaret Walch, one of the sisters, after selling her interest to her nephew, the defendant, died before the said Nancy. It seems to be doubted whether William Walch, the only

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brother of the testator, is dead or not, but he also sold his interest to the defendant, Norman Walch, long before the death of the tenant for life. The other sister, the complainant, Mary, sold her interest under the will to her co-complainants, reserving a life estate. The defendant is the surviving executor of the will, and, under it, had advertised the land and slaves for sale, when he was enjoined by this bill.

The complainant, Mary, claims the whole estate, upon the ground, that, at the termination of the life estate, she was the only legatee, and therefore, as the property was given to the brother and sisters, as a class, she is entitled to the whole, as she alone answered the description at that time. That doctrine can have no application to a case like this. There was no uncertainty or contingency as to the legatees. He had only one brother and two sisters, and to them the remainder is given. The gift is as perfect and explicit as to the persons who are to take, as if they were named; the remainder vested in his brother William, and sisters, Margaret and Mary, under the description of brother and sisters, upon the death of the testator, in the same manner as if their names had been inserted. We are unable to see how the fact about which there seems to have been some controversy, that is, whether, in the original will the word used in the disposition of the remainder was "brother, or brothers," can have any effect in the construction. It is certain he had but the one brother, and we have no doubt but that the word was in the singular, and not plural number. But that could not afford the least aid in the construction, that we can perceive. Whether a fund is an aggregate one, passing to the legatees, as a class, in which case only those who constitute the class, or answer the description, at the time the estate falls, can take, or devolves upon and vests in the individuals of the class described, so as to descend to their heirs, or pass by alienation, is often a question of very great difficulty in its application. But there has been enough written in our

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cases, upon that doctrine, and it is only necessary to apply the principles settled upon it, to new cases, as they may arise.

We have no hesitation in holding that, in the case under consideration, the complainant is only entitled to one-third of the property.

Such was the decree of the Chancellor, and it is affirmed.

E. MYGATT & Co. et al. v. McCLURE & ROBERTS et al.

PARTNERSHIP. *Deed of Trust. Dissolution.* Either partner may, during the existence of the partnership, make a valid assignment of the goods of the firm, to secure debts due therefrom; but if the partnership, by mutual consent, is dissolved, and the debts, accounts, and goods placed in the hands of a third person, to wind up and settle the firm business, neither partner can, thereafter, make a valid disposition of them.

FROM MONTGOMERY.

Chancellor FRIERSON pronounced a decree for the complainants, at the April Term, 1859, from which the defendants appealed.

ROBB & BAILEY, for the complainants.

KIMBLE, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The complainants, Mygatt & Co., have judgments against McClure & Roberts for about \$4800, and the other complain-

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ants, Cochran & Co., a judgment against the same for between nine and ten hundred. On all which, executions have been returned unsatisfied. Then, these bills were filed Sept. 28, 1857, to attach the notes, accounts, and other effects of the firm, in the hands of defendants, Stacker & Boardman, acting under Quarles, trustee. The effects were attached, and placed in the hands of a receiver.

The defence to the bills is, that on the 9th of May, 1857, all these effects were assigned to James M. Quarles, in trust, for the payment of preferred creditors, by R. W. McClure, the partner, in the name of the firm, and by him acknowledged, and duly registered, on the 12th of June, 1857. In the fall of 1856, after having done business several years together, as dry goods merchants, in the town of Clarksville, they became embarrassed, had some difficulty and misunderstanding about their affairs, and determined to close the concern. Neither being willing to trust the other in winding up the business, by selling out the remainder of goods on hand, and collecting and paying the debts, mutually agreed to place the whole business under the control and management of George Stacker, to wind up and settle. For a short time after this, both partners paid *some* attention to the business, but under the superintendence of Stacker. But both were much absent—particularly McClure, who was engaged in the iron making in West Tennessee. Roberts, before the goods were all sold out, left the State, and settled in St. Louis, leaving the business, in the hands of Stacker, under the agreement before stated. After Stacker, with Boardman to assist him, had completed the sale of the goods, and settled up much of the business, by collecting and paying debts, McClure, in the absence and without the knowledge of Roberts, made the deed of trust as before stated, covering all the firm effects.

The complainants insist that this assignment is not in the way of the relief they seek, but that they are entitled to have all the firm effects applied to the satisfaction of their judgments. And that is the question in the case. The Chancellor decreed for them, and the defendants appealed.

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Either partner may, while the partnership exists, sell all the goods, or make a valid assignment of them to secure debts against the firm. *Lassell v. Tucker*, 5 Sneed, 33. But does this power exist after dissolution? This partnership was dissolved. Story on Part., § 321; 6 Ves., 119-26. This may be done, "by the voluntary separation of all the partners, and their final relinquishment of the whole business thereof." Here they disagreed, and left the business in the hands of another; and one went to another division of the State, engaged in a different business, and the other removed to Missouri. This was an effectual dissolution, and the question is, whether, after that, either had the power to make a valid disposition of the joint effects, without the concurrence of the other.

A dissolution does not deprive the partners of all power to act in the settlement of the firm business, for that would be ruinous to all, force creditors into court, and the business into the hands of a receiver, who might be a stranger to it. But each partner is left with full power to do all such acts as may be *necessary* to settle up and close the business; such as collecting debts and receipting therefor, settling up accounts, receiving property, applying the firm funds and effects to the payment of the debts, &c. Story on Part., § 328. Yet, if this power to wind up and settle the business is delegated to another, upon the dissolution, the partners cannot exercise it. *Ib.* That was this case. The same effect would follow if the business had been confided to one of the partners. The power of the others would be in that case excluded.

In *Dickerson v. Wheeler*, 1 Hum., 51, it is held that one partner, after the dissolution, cannot even pass the title to a firm note, by endorsement. That is, however, upon the ground that he cannot create any new obligation against the firm after it has ceased to exist. The mutual agency to bind each other terminates with the partnership.

We are not aware of any authority that would sustain the power of one partner, after dissolution, to make a valid assignment of the firm effects to secure creditors of the firm;

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but that is not necessary to be decided in this case. Here the special agreement to confide the whole business to Stacker, and place all the effects under his entire control, without the interference of either partner, would certainly deprive one of them of the power to apply the joint effects, by assignment or otherwise, to any one, or a part, or all the creditors. It would be an usurpation of authority, and void.

It follows that the Chancellor was right in disregarding the deed of trust, as a nullity, and sustaining the claim of the complainants as judgment creditors, under their attachments, to the notes, accounts, &c., in the hands of Stacker.

The decree is affirmed.

M. M. BRIEN v. PETERMAN & COPE.

1. ACCOUNTS. *From another county, or State. Affidavit. Evidence.* Act of 1819, ch. 25, § 1, Code, § 3780. The true construction of the act of 1819, ch. 25, § 1, carried into the Code, § 3780, is, that the denial, on oath, of the justice of an account coming from another county, or State, does away all the force of the affidavit of the plaintiff, and puts him to the proof of the account as though the act had not existed.
2. SAME. *Same. Practice. When the Affidavit may be made by one defendant.* Where the defendants, if more than one person is sued, have a joint interest, and are jointly concerned in the defence against the account sued on, the oath of one, if it go to the justice of the account as to both, is equally efficacious as if made by both.

FROM JACKSON.

This cause was heard at the June Term, 1857, before Judge GOODALL. The plaintiff appealed.

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WASHBURN, for the plaintiff.

DENTON, GOODPASTURE and SWOPE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The plaintiff sued the defendants in the Circuit Court of Jackson county, upon an account coming from another county, verified by his affidavit before a justice of the peace, and certified as required by the act of 1819, ch. 25, sec. 1. The account was filed with the declaration. The defendants denied, on oath, the justice of the account, and the parties went to trial upon proof, under the plea of non-assumpsit. The plaintiff offered to read to the jury the account, so verified and denied, as evidence, but the Circuit Judge refused to allow this, upon objection by the defendants, upon the ground that the justice of the same had been denied on oath; and instructed the jury that the *onus probandi* to establish his account, was upon the plaintiff. In this there is no error. We may remark, that the oath, or affidavit, denying the account, is made by Peterman alone; but no question is made upon this, and we suppose none could be, since the defendants are sought to be charged *jointly*, as the personal representatives of Thomas Cope, deceased, and are alike interested in the defence of his estate against this demand, and the oath broadly denies the justice of the account as to both. We do not mean to say that if liable at all, it is not in their individual character, for the account arises for professional services claimed to have been rendered them as the executors of Thomas Cope, in the defence of his will upon an issue of *devisavit vel non* between them and his heirs; but what we mean, is, that we suppose, if charged, they would be entitled to reimbursement from the estate; and, at all events, are *jointly* concerned in the defence. In such a case, in analogy to defences in equity, (*Petty v. Hannum and Drane*, 2 Hum., 102,) the oath of one, if it go to the justice of the account as to both, must be equally efficacious as if by both.

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Taking this to be so, it is clear, that the true construction of the act of 1819, ch. 25, sec. 1, carried into the Code, at sec. 3780, is, that the denial, on oath, of the justice of the account, does away all the force of the affidavit of the plaintiff, and puts him to the proof of the account as though the act had not existed. Such is the decision of our predecessors in *Cave & Shaffer v. Baskett*, 3 Hum., 340, 343.

The declaration was filed at the July Term, 1856, and the denial on oath was not made till the 30th of June, 1857, the day before the trial, and it is insisted the plaintiff was taken by surprise, and that the Circuit Judge erred in receiving it at so late a day. There is nothing in this. If not prepared to establish his demand, the plaintiff should have asked for a continuance of the cause; but this he did not do, but elected to go to trial, and must abide the result.

Affirm the judgment.

THE STATE v. JAMES M. LOFTIS et al.

CRIMINAL LAW. *Prosecutor—death of.* The accident of the death of the prosecutor marked on an indictment, pending the prosecution, does not operate as a discharge of the accused. The prosecution goes on, as though the death had not occurred.

FROM JACKSON.

The defendant was discharged by Judge FITE, and the State appealed.

HEAD, Attorney General, for the State.

S. S. STANTON, for the defendant.

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CARUTHERS, J., delivered the opinion of the Court.

The defendants were indicted at March Term, 1858, in the Circuit Court of Jackson, for selling unwholesome provisions. Marlin Young was marked as prosecutor.

After a conviction and new trial, and continuance, the prosecutor died. At the March Term, 1859, this fact was set up in a plea by the defendants. The Court overruled the demurrer of the Attorney General to this plea, and discharged defendants, and the State appealed.

We think his Honor erred in this judgment. We are referred to no authority to sustain it, and if any such existed, we would not be inclined to be governed by it.

It is true, that this is not one of the cases, twenty in number, Code, sec. 5097, excepted in our law from the necessity of a prosecutor upon the indictment, and, therefore, one was absolutely necessary. Code, sec. 5096. But the law in this respect was complied with when the prosecution was instituted; and the question is, whether his death before the termination of the case, shall authorize the indictment to be quashed, or the defendants discharged. We can see no good reason why it should have that effect. The main object of requiring a prosecutor is, that some citizen shall stand forth as the originator of the charge, and be responsible for it before the country. He is also liable for costs, when it appears that the prosecution is frivolous, or malicious; but that rarely occurs, and it is not a matter of interest to the defendant, but only to the public.

It would be most detrimental to public justice, and the administration of the criminal laws, if the accident, of the death of the prosecutor, would necessarily operate to discharge the accused. The greatest felons might escape punishment, if this were so.

The judgment will be reversed, and the case remanded for trial.

Elias Dowell *et al.* v. Francis Dowell *et al.*

ELIAS DOWELL *et al.* v. FRANCIS DOWELL *et al.*

CHAMPERTY. *Evidence. When attorney implicated, a competent witness.*

If, by the admissions of a party, a champertous contract is established between him and his attorney, such attorney is not a competent witness to prove that the statements of his client are false, and that no such contract was entered into.

FROM SMITH.

The bill of the complainants was dismissed by Chancellor RIDLEY, and they appealed.

McLAIN, and HEAD & TURNER, for the complainants.

S. FITE, and J. B. MOOERS, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The Chancellor, without regard to the merits, dismissed this bill for champerty. From that decree the appeal was taken, and the question is, whether it was right.

The attorney who instituted the suit was employed by Elias, but it was to recover the rights of the other co-complainants, as well as his own. The contract with the attorney, which is alleged to be champertous, was made by him, and the proof of its existence is by his admissions and statements. If it be made out, it is in violation of law, and being made in behalf of all the parties, though by only one of them, affects the interest of all, and is fatal to the whole suit. *Vincent v. Ashley*, 5 Hum., 594.

Whether the champerty is made to appear by the filing of interrogatories, or by bill, as prescribed by the act of 1821, Code, secs. 1781-2-3, or is disclosed by the proof in the cause, the effect is the same. It is made the imperative duty

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of the Court to dismiss the suit. *Webb v. Armstrong*, 5 Hum., 380.

It is not material either, whether the illegal agreement or contract be made with an attorney or other person. *Weedon v. Wallace*, Meigs, 286. But in this case, if the contract was made at all, it was with an attorney.

The contract established in this case by the repeated admissions and declarations of Elias, was, that he was to pay his attorney fifty dollars if the suit was gained, and if lost, nothing. That he thus stated the contract cannot admit of doubt. But it is contended that this is untrue,—that no such conditional contract was made, and the attorney is offered as a witness to disprove it. The Chancellor held him incompetent, and that is the only question.

An attorney, or any other person, charged with champerty, by force of the statute may be compelled to answer a bill or interrogatories as to the charge, notwithstanding the penalties imposed by the statute as well as the criminal law. But this is an exception to the common law rule, that no man shall be compelled to criminate himself, and is only permitted because such is the express provision of the statute. *Douglass v. Woods*, 1 Swan, 393.

None of these cases, however, or any other in our reports, of which we are aware, meet the question now presented. The attorney implicated voluntarily proposes to become a witness to disprove the statements of his client, and prove that no such conditional or champertous agreement was made. It is unnecessary, perhaps, to say that the high character of the gentleman implicated, would secure to whatever he might swear the most implicit confidence. But the question is entirely one of legal competency, and not of credit.

That part of the statute which requires the attorney who participates in such champertous contract to be stricken from the list of attorneys, gives him an opportunity to answer for himself to a bill, or interrogatories. Code, 1783. But the action of the Court in this case is not against him, but his client, by the dismissal of his bill. He is not called upon to

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answer, nor is he affected by the decree repelling the complainant from the Court without an investigation of his rights. This is done upon his own confession and statements, voluntarily made. It is proposed to prove for him, and for his benefit, by his attorney's oath, that what he has said is false. It would be very proper, if any proceeding were pending against the attorney for a participation in the unlawful act, admitted by the party, to hear him in his defence. So long as the consequence of his violation of the law is only attempted to be visited upon the party himself, it would seem to be no hardship to deny him the right to introduce evidence to prove his own statements false. But independent of this, we think, upon principle, the attorney is incompetent to prove that his client's statement is false, and that the illegal agreement was not in fact made. He is interested in that question because, as a consequence of finding the existence of champerty in the case, the suit is not only dismissed, but he is to be stricken from the roll and disqualified to practice in the Courts of this State for five years. Although this cannot be done without giving him a chance to answer and defend, yet the fact that it does appear in the suit subjects him to the charge as a consequence. He is surely interested, then, in proving that no such agreement was made. We do not, of course, intend to intimate that the respectable attorney implicated would not state the facts correctly, or that he entered into the illegal contract in relation to his fee, but only decide that he is not competent in law to be a witness on that question, and that by the legal evidence in the cause, the fact is established. Therefore the Chancellor, in obedience to the express mandate of the statute, properly dismissed the suit.

The merits of the case are not open to investigation, and we have not examined, nor do we give any judgment upon them. But simply affirm the decree of the Chancellor, upon the ground stated.

Samuel Harlan v. W. C. Dew.

SAMUEL HARLAN v. W. C. DEW.

PRACTICE AND PLEADING. *Declaration. Demand and notice. Endorser.*

In an action by the endorsee against the endorser of a bill single, the plaintiff must aver, in his declaration, demand of payment of the maker, and notice of dishonor to the endorser, or assign some legal excuse for not having done so. This defect is not a matter of form; nor is it cured by a judgment by default.

FROM WILSON.

Judgment by default was rendered at the January Term, 1859, DAVIDSON, J., presiding. The cause was brought up by a writ of error.

W. L. MARTIN, for Harlan.

E. I. GOLLADAY, for Dew.

WRIGHT, J., delivered the opinion of the Court.

This is an action by the endorsee against the endorser of a bill single, in which the plaintiff had judgment by default. The declaration, in our opinion, is fatally defective. There is no averment that any demand of payment was made of the maker, or notice of the dishonor of the bill single given to the endorser; nor is any excuse assigned for not having done so. Without these material allegations, the plaintiff has shown no cause of suit or title, and there is no foundation for the judgment. It was decided by the Supreme Court of this State, at its December Term, 1840, in *Knott et al. v. Hicks et al.*, 2 Hum., 162, that the want of an averment of notice of the dishonor of a note in a declaration against the endorser, was fatal to the plaintiff's title, and was not aided by verdict. And, *a fortiori*, this must be so in a judgment by default.

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There is nothing in the Code which shakes this well established rule of pleading, but much to confirm it. The precedents there given show that these averments are still required; and at section 2883, it is made the duty of the Court to see that the rules of pleading are substantially adhered to, and for this purpose it is empowered to impose terms upon delinquents.

The omission cannot be obviated upon the notion that it is matter of form, or is cured by the judgment. It is not the case of a defective statement of a valid title, or right of recovery, which may be aided by verdict; but it is the entire neglect to state any title whatever.

We cannot notice the bill single, or the endorsements upon it, which are copied into the transcript by the clerk—to see that demand and notice are there waived—because the simple profert of them, without oyer, does not make them a part of the record, and they are not made so by bill of exceptions. In disposing of the writ of error, we can only look to what is of record.

The plaintiff, in order to establish his title to a recovery, should have averred demand and notice, or excused himself by reason of the waiver.

The judgment of the Circuit Court will be reversed, and the cause remanded for a trial, with leave to amend the declaration.

Jordan Bostick *et al.* v. John Elliott *et al.*

JORDAN BOSTICK *et al.* v. JOHN ELLIOTT *et al.*

and

SILAS TUCKER *et al.* v. V. D. COWAN *et al.*

1. ADMINISTRATORS AND EXECUTORS. *Resignation of a co-executor. Liability for a devastavit.* If two or more are appointed and qualified as executors, and one is guilty of a *devastavit*, after which his co-executors resign, and he executes a new bond, such co-executors are, primarily, liable for such *devastavit*.
2. SAME. *Same. When new sureties are indemnified.* If the remaining executor resign, and one of his sureties is appointed administrator *de bonis non*, with the will annexed, and sufficient indemnity is given him to cover such *devastavit*; or, if such indemnity is given to the new sureties, the primary liability rests upon them, and not upon the co-executors.
3. SAME. *Same. Same. When indemnity not sufficient to save both.* If the indemnity given by the remaining executor was to secure and make good the estate then in his hands, or which he had wasted, and were insufficient to save harmless, both the co-executors and new sureties, the latter are, primarily, liable.

FROM RUTHERFORD.

These causes were heard before Chancellor RIDLEY, at the October Term, 1857.

ELLIOTT, for Bostick *et al.*

KEEBLE, AVENT, and PALMER, for Tucker *et al.*

CARUTHERS, J., delivered the opinion of the Court.

The original bill was filed by the children and legatees of James Elliott, deceased, on the 6th of May, 1845, against the various executors and administrators, with the will annexed,

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for the settlement of the estate, and recovery of the amounts due them, respectively.

The will was made October 30, 1836, and at November Term following of the County Court for Rutherford county, it was proved, and John Elliott, the testator's brother, and Silas Tucker and George Thompson, were qualified as executors. The will directed certain property, real and personal, to be sold, the debts paid, and the residue to remain in the hands, and to be managed by the executors for the support, welfare and comfort of the widow, and her six children. The widow dissented at the January Term, 1837, and received what the law allowed her. By the 25th of December, 1836, the executors, by sales of property, &c., under the will, had in their hands \$13,459.87. Out of this the widow received her one-seventh. With the exception of \$1,023.67, the proceeds of the cotton crop on hand at the testator's death, received by Tucker, all the funds of the estate went into the hands of the active executor, John Elliott. The first settlement was made with the clerk of the County Court, in July, 1839, showing in the hands of Elliott \$4564.47, as the whole of the assets after deducting disbursements. On the 17th of December of the same year, another settlement was made, bringing the account down to 1st of January, 1840, showing in his hands, including notes on Henry and Cothron, and his own indebtedness to testator, \$9369.29. At this time Thompson and Tucker becoming uneasy on account of their joint liability, required a bond of indemnity from Elliott, which he failed to give, and then the assets, amounting to 11,441.63, were partitioned among them. Each, it seems, were expected to secure the others against liability for waste by either, with respect to the amount in their hands, respectively. This not having been done by Elliott, on the 22d of January, 1840, Thompson and Tucker filed their bill to compel him to surrender the estate, and account for his executorship. At the August Sessions, 1840, of the County Court, Tucker and Thompson resigned, and Elliott became sole executor, and gave a new bond for the faithful performance of his duties

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with Cowan, Mitchel, Avent and Anderson, his sureties. The two-thirds of the assets, in the hands of Tucker and Thompson, were then returned to Elliott, and their bill soon after dismissed. In May, 1841, he made his first settlement as sole executor; his second, in April, 1842, and his third, in March, 1843. In all these settlements he was charged with all the assets. In the first, \$11,067.21; the second, \$12,289.90, and the third, \$13,086.28. In May, 1843, he resigned, and Cowan was appointed administrator with the will annexed, with his co-sureties and Elliott to his bond. Cowan made his first settlement, April 13, 1844, and a second, April 8, 1845, charging himself with all the assets, viz: In the first, \$12,075.67, and in the second, \$11,188.59. Soon after this, viz., 9th of May, 1845, the bill in this case was filed by the heirs of James Elliott, the testator, against all the original executors, and Cowan, and his sureties, praying for an account of the administration. In January, 1847, Tucker and Thompson filed their cross-bill against all the other defendants, praying to be exonerated from all liability, at least in the first instance.

Another important fact in view of the questions which arise, should be here stated. Between the first and second settlements made by Elliott as sole executor, viz: on the 1st of April, 1842, he made a deed of trust to one James M. Avent, on his real estate and slaves, to indemnify and make safe the sureties in his bond, on account of their liability for his administration of the estate.

It turns out upon investigation of the case, according to the reports under interlocutory decrees, of which there have been many in the fifteen years this case has been pending, that Elliott wasted the estate, and that he only paid over to Cowan, his successor, \$2581, although in the settlements of the latter, he charged himself with the whole estate, leaving the balance of the \$13,086.28, viz., \$10,455.28, unaccounted for, or wasted. In the last settlement of Cowan, however, made 8th of April, 1845, just one month before this bill was filed, the amount seems to have been reduced by credits to

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\$11,188.59. But the property of Elliott sold under the deed of trust, netted \$11,287.52, leaving a part unsold. So it appears that Cowan received from Elliott in these two sums, \$13,868.52. After all this, it seems, that in the final decree, Thompson and Tucker are made liable for \$3981.70, for the *devastavit* of their co-executor, Elliott, previous to the 3d of August, 1840, when they resigned, and Cowan and others became responsible. The case was before this Court in 1850, when a decree of 1848, made by Chancellor Cahal, by which Thompson and Tucker were exonerated from primary liability, was reversed, and the cause remanded to ascertain, among other things, what was the amount of the waste committed by their co-executor, Elliott, prior to August, 1840, for which they were declared to be primarily liable. Chancellor FRIERSON settled the amount as above stated in his decree of 185—, and ordered the retaking of the account upon other matters. The final decree, by Chancellor RIDLEY, was in conformity to the said interlocutory decree on this point. Thompson and Tucker appealed, and so did the complainants on other matters in relation to the account, and final decree.

The complainants have no interest in the question made by Thompson and Tucker, as the *devastavit* must be made good to them, and the only question is, by whom it shall be done?

We are entirely unable to see upon what principle of law or equity the co-executors can be made, primarily, liable. True, if the *devastavit* occurred while they were joint executors, as probably it did, to the extent stated, they would be bound under the circumstances, to make it good, unless that has been done by Elliott, who committed it. But if this has been done, they are clear, and the responsibility is changed to their successors for the whole estate. The above facts clearly show that Elliott, by his money, and his property, has paid over more than ever came to his hands, before August, 1840. It follows then, beyond all controversy, that Tucker and Thompson are released, and that the burthen of accounting for the whole estate, whatever it is, devolves upon John Elliott and his sureties of 1840. It is said that there is a loss which

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must fall upon either the securities of 1840, or the co-executors who then resigned, as it turns out that the trust property is not sufficient to save both; and that, as the deed of trust is expressly made to indemnify and save harmless the sureties of 1840, and not the retiring executors, the loss must fall upon the latter to the extent of any prior waste, as they (the sureties) should enjoy the advantage of their superior vigilance in guarding themselves against it. But the substance of the transaction was to secure and make good the estate then in his hands, or which he had wasted, by the application of his own property; and if this were not a sufficient answer to the position, the fact that by himself, and his trustee, he has paid more than he was liable for when they resigned, must surely discharge those who were bound, by their association with him, for his acts prior to that time. The difficulty in the case is, not to arrive at this conclusion, but to see how any other could be arrived at.

An attempt is made to diminish the estate, by showing that John Elliott was entitled to a credit, which he has never been allowed, for \$3310 paid by him for two debts of his testator as endorser for Alfred Elliott, one to deputy sheriff Burton, for \$2410, and the other to a man by the name of Word, for \$900. These credits were not claimed in his various settlements with the County Court. That is a strong presumption against them, particularly as the amounts are large, and he hard pressed for vouchers. But we think the proof does not sustain these claims as demands against the testator; but it shows that in law, whatever they might have been originally, they had been made the individual debts of John Elliott. The evidence is too obscure to satisfy the mind that they ever were valid demands against the estate of James Elliott. But if they were, John took them upon himself to favor his brother Alfred, and thereby released the estate. He may have used some of the assets of the estate to do this, but that does not change the case.

We hold, therefore, that John Elliott, and his sureties of 1840, are liable for the whole estate. The proceeds of any

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other property, embraced in the trust deed, not yet sold, shall be applied in exoneration of the sureties of 1840, to that extent, as well as any rents and profits which may have accrued upon it in the hands of the trustee.

There are sixteen exceptions taken for complainants, and nearly as many on the other side. We have examined them, and need only say, that we think the action of the Chancellor upon them was correct, except as to that exception of complainants which controverts the allowance of a credit to defendants of about \$600 for insolvent debts, with which the executors had charged themselves. We think this claim of a credit comes entirely too late, and is not well made out by the evidence. Without going into the argument made in favor of this exception, it is enough to say, we consider it well taken, and allow it.

The decree will be modified in conformity with this opinion.

R. M. HOUSE *et al.* v. OLIVER THOMPSON *et al.*

1. **PARTNERSHIP.** *Lien. Election. Firm debts are joint and several.* The debts of a firm are joint and several, and the individual property of its members is as much bound by a judgment against the firm, as the firm property. Hence, the judgment creditor has his election to enforce payment out of the individual or firm means.
2. **SAME.** *Same. Same. Assignment of judgment.* This right of election extends to the assignees of the judgment. If the assignees are creditors of the firm, and have received an assignment of the firm effects to secure them, their right to enforce payment of the judgment out of the individual means of a member is not, thereby, affected.
3. **SAME.** *Same. Firm creditors have no lien on the partnership effects.* There is no lien, or other equity, in favor of firm creditors upon the partnership effects. They stand upon an equality with the individual

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creditors. The partners themselves have the right to require the application of the partnership property to the payment of the firm debts, so that any lien or equity the creditors have is to be worked out through, and is dependent upon, that of the partners.

4. *SAME. Same. Same. When a creditor has two funds out of which he can make his debt. If one creditor has a right to go upon two funds, and another upon one, both having the same debtor, and the funds are the property of the same person, the first shall take payment from the fund to which he can exclusively resort, so that both may be paid. But this rule is confined to cases where creditors have the same debtor, and the funds are the property of the same person.*

FROM MONTGOMERY.

This cause was heard before Chancellor FRIERSON, at the October Term, 1859.

HOUSE, for the complainants.

ROBB & BAILEY, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Newell and Pritchett were partners in the iron business, under the name of W. E. Newell & Co., and failed about the 18th of November, 1856, with considerable property, both joint and separate, and largely indebted as a firm, and individually. The contest now is between the complainants as assignees and creditors of Pritchett, for a house and lot in Clarksville, owned by him individually, and the defendant, Thompson, who is a judgment creditor of the firm.

On the 9th of Sept., 1856, Thompson recovered his judgment against the firm, for \$1138.32, on which *fi. fa.* issued Oct. 1, 1856, and the same was levied upon the lot in question on the 20th of the next month. Whereupon this bill was filed to enjoin the sale, and appropriate the property to the separate creditors under the deed of trust made by Pritchett for their benefit.

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On the 18th of Nov., 1856, Newell and Pritchett made an assignment of their partnership property, to a large amount, and a portion of the separate property of each, to secure creditors of the firm as well as some of their individual debts. But the dwelling house and lot of Pritchett now in question, was not included. But, at the same time, Pritchett alone made an assignment of said house and lot, and other property, to complainants, to secure them and others in the payment of his separate debts.

It further appears that the trustees in the joint assignment purchased of Thompson the benefit of his judgment, by the payment to him of the amount, and obtained an assignment of it.

The complainants claim that as Thompson's judgment is upon a firm debt, and being anterior to both assignments, is a lien upon the joint as well as the separate property of the partners, and should be satisfied out of the firm property, and not the separate estate of Pritchett, as against the complainants—his individual creditors. The Chancellor thought otherwise and dismissed the bill, or rather decreed the fund—the lot having been sold, and the proceeds in Court—to the defendants. A very forcible and learned argument is made against the decree: But upon full consideration of the authorities, we are brought to the conclusion that the decree is right.

It is clear that Thompson's claim was several as well as joint, and that his judgment of the 9th of Sept., 1856, was a lien upon the separate as well as joint property of Newell and Pritchett, and consequently he had a right to enforce satisfaction out of the property of either. This right of election would extend to the assignees of Thompson's judgment, unaffected by the deeds of trust. The fact that they had become interested in the preservation of the firm effects, as creditors under the joint assignment, and for that reason would protect them by seeking satisfaction out of the individual property of one of the partners, cannot affect the question of right.

It seems that a loss must fall somewhere, as the whole property, both joint and several, will fall far short of paying the

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debts, and the contest is, who shall save the most, or suffer the least.

The assignments being subsequent to the judgment, could have no effect to change or abridge the rights of the judgment creditor, or control and limit his lien. If it was his right before that, to elect whether he would enforce satisfaction out of the joint or individual property of the partners, such right still continued, notwithstanding the assignments. And that such is the law, there would not perhaps be any controversy. Story on Part., Note to sec. 376; sec. 379; 1 Story Eq., § 645.

But it is contended that the rule which requires that debts against a firm shall have priority of satisfaction out of the partnership effects, and debts against the individual members should have a like preference over the firm debts, as to their separate property, applies to this case. We think it does not.

There is no lien, or other equity, in favor of firm creditors upon the partnership effects. This can only be fixed by judgment, like other creditors. So the partners may make a *bona fide* transfer of the joint property, exempt from any lien for firm debts, to one of their own members, as well as a stranger. Story on Part., 358. By such voluntary sale, the partners themselves part with any right *they* may have had to hold the firm means liable for its debts. Story on Part., 359. The partners themselves have a right to force the application of the partnership property to the payment of the firm debts; and this right—sometimes called a lien—is paramount to the right of a creditor of any member of the firm, to the interest of his individual debtor in the concern. The firm creditors, in this way, have a preference over the individual creditors, to have satisfaction out of the joint property. In this way, and for the benefit of the partners alone, a preference is given to the joint creditors. So that any lien or equity the creditor has, is worked out through, and is entirely dependent upon, that of the partner. Story on Part., 97, 360. This specific lien of each partner upon the present and future property of the firm, extends not only to their joint liabilities to third persons, but to the capital stock, and funds

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advanced by each member, and for all funds or moneys abstracted by either. Story on Part., 97.

The representatives of a deceased partner, and the assignee in bankruptcy, enjoy the same rights of the member of the firm they represent, and no others. This rule applies to these cases, and to cases of insolvency under certain circumstances, and perhaps to no others. To give application to the principle under consideration, there must be two funds for distribution, with creditors against each,—the one joint and the other several,—and an equitable right on the part of the owners of the joint fund, or the separate fund, to throw the debt upon the other. That does not exist in this case. Thompson's debt is several as well as joint. He had a judgment against both partners before the assignments, and the property of both, as well separate as joint, was liable to him, with a lien fixed upon it all prior to the right of the separate creditors of Prichett under his trust deed. As has been before shown, Thompson had a perfect right to take the joint or separate property of either, as he might elect. So at the time the right of the separate creditors accrued by virtue of the assignment for their benefit, the property assigned was appropriated by law to another. If there had been no judgment at the time, the question would of course have been very different.

2. But another principle is relied upon by the complainants. When one creditor has two funds out of which he can make his debt, and another creditor can only reach one of them, the former shall be forced to go upon the fund not subject to the debt of the latter. It is true that such is the general rule of equity. But like the other rule discussed above, it does not cover the case in hand. That principle only applies to cases where both debts are due by precisely the same debtors. Story on Part., 364. 1 Story Eq., 560. That is not the case here. The debt of Thompson is due from Newell and Pritchett, and that of the complainants from the latter alone. The case of *Dorr v. Shaw*, 4 John. Ch. Rep., 20, is to the same point. In that case the Court adopts the rule laid down

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by Lord Eldon, in Kendal's, case 17, Ves., 520: If "A. has a right to go upon two funds, and B. upon one, *having both the same debtor, and the funds are the property of the same person*, A. shall take payment from the fund to which he can resort exclusively, so that both may be paid." But here the creditors, as well as the funds, are different. The one fund—that in controversy—belongs to Pritchett, and the other to the firm. To the same effect is sec. 645, Story's Eq. See, also, sec. 644.

In addition to these considerations, it is perhaps sufficient to say, that inasmuch as there is no doubt but that since the act of 1789, ch. 57, all obligations and assumptions of partners are made several as well as joint, a judgment against the firm is a lien upon the separate as well as joint property of the partners; the separate estate of Pritchett become bound from the date of the judgment, so as to take it out of the power of the owner to appropriate it to any other debts, either joint or individual, as against that lien. *Reid v. House*, 2 Hum., 588. It is no answer to say that he also had a lien upon the joint property of the firm, which was sufficient to satisfy his debt, because, as we have seen in the commencement of this opinion, he cannot be controlled as to the fund to which he may resort in such a case.

The result is, that the decree of the Chancellor will be affirmed, and the fund paid out accordingly; for which purpose the case will be remanded.

JAMES P. KIRKMAN *et al.* EX PARTE.

1. SALE OF REAL ESTATE. *Infants. Next friend. Practice.* In a proceeding for the sale of real estate belonging to minors, by *next friend*, it is not necessary that the next friend should be selected or appointed by the Court. He would, however, be under its control,

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and might be removed and another appointed, if the interests of the infants required it.

2. **SAME.** *Jurisdiction. Private sale.* A sale made of real estate, by the next friend, without a decree authorizing it, and pending a decree requiring the Master to sell the same at public auction, &c., is void. But the Court may, with the assent of the purchaser, adopt and confirm such sale, if beneficial to the minors, and the purchaser would acquire a good title.

FROM DAVIDSON.

Appeal from a decree pronounced by Chancellor FRIERSON, at the November Term, 1859.

EWING & COOPER, for Kirkman.

E. H. EWING, for Smith *et al.*

CARUTHERS, J., delivered the opinion of the Court.

The petitioners are the four minor children of John Kirkman, who file this petition or bill by their father, as next friend, for the sale of a tract of land of 70, 102-160 acres, a short distance from Nashville, on the Franklin turnpike, which had been devised to them by their maternal grandfather, N. A. McNairy. The petition or bill was filed Nov. 30, 1857.

After a proper reference and report, the Court decreed a sale *at public vendue*, by the Master, after due advertisement, on credits of one, two, and three years, at interest. The *minimum* was fixed at \$125 per acre. The Master did not sell, but instead thereof the next friend made a sale before the next term, at \$200 per acre. This fact was suggested to the Court, and a reference was made to the Master to take proof and report whether it was to the interest of the infants to adopt, ratify, and confirm this sale. The report being favorable, and entirely satisfactory, the Court adopted and confirmed this

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sale, and the notes of the purchasers, payable to the Master, were filed and placed under the control of the Court. The money was ordered to be invested in county or State bonds.

On the falling due of the first note, the purchasers, Georgia A. McGavock and Susan C. Smith, married women, by their next friend, Francis McGavock, filed a petition to be released from the purchase and the payment of the money, on the ground that under the proceedings a good title would not be obtained by them. Two grounds are assumed :

1. That the bill or petition is filed by a "self-constituted" next friend. We are not aware of any other mode of making a next friend, in the first instance, for a proceeding of this kind. He would be under the control of the Court, and might be displaced, and another more suitable appointed, if found necessary for the interest of the infants. The selection in this case was certainly most appropriate, as the next friend is the father of the infants, and liable to no objection, and in every way competent to act for his children.

2. The sale of the land was made at private sale, by the next friend, without any decree authorizing him to do so, but pending a decree requiring the Master to make the sale at public auction, upon advertisement, &c. This was certainly an invalid sale, not binding upon the Court or the purchaser. It would communicate no title. But the Court might adopt and confirm it, with the assent of the purchasers, if found beneficial to the infants, upon full and scrupulous investigation. In this case it clearly appeared by the report of the Master, and ample proof, that the sale was an excellent one, the price being \$75 an acre more than the land was proved to be worth by the best judges of property. It is not controverted that the Court might have ordered the sale to be made privately, as well as publicly. If so, why not allow the Court to accept and ratify a sale, or rather a bid, made through the next friend, without any anterior decree to sell in that way? It is in effect a sale made by the Court, and not the next friend. He is only the medium through which the offer is made known to the Court. There is no sale until confirmation, in any case. It is the

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sanction of the Court that makes it a sale. Until that is done, it is only an offer or bid. The Court will take care of the infants, without the kind aid and assistance of the purchasers, particularly when they have given a high price, and are tired of their bargain. They get a good title in this case, and must stand to their purchase.

The decree dismissing the petition of the purchasers will be affirmed.

NEIL JENNINGS *v.* THE STATE.

1. CRIMINAL LAW. *Slaves. Selling liquor to.* Spirits cannot be sold or delivered to a slave, under any circumstances, for his own use, not even in the presence, or by permission, of the master. It can only be sold or delivered to a slave for the use of the master, and then the owner or master must be present, or send a written order for the spirits.
2. SAME. *Same. Character of the order.* To authorize the selling of spirits to a slave for the master, it must be done in his presence, or upon a written order, specifying that it is for himself, and the quantity to be sent. A general, or indefinite order is not sufficient. An order is good, only, for a single transaction.

FROM DAVIDSON.

The plaintiff in error was found guilty at the December Term, 1859, TURNER, J., presiding, and appealed to this Court.

Cox, for the plaintiff in error.

HEAD, Attorney General, for the State.

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CARUTHERS, J., delivered the opinion of the Court.

This is an indictment for selling spirits to a slave under the Code. The confusion in the sections on that subject, renders it necessary to place a construction upon them. His Honor, the Judge of the Criminal Court at Nashville, charged, that in taking all the provisions together :

“ A slave cannot buy liquor with the consent of the master or person having control of him, to be drank at the place where sold ; and that section 4865 of the Code, makes in-operative that section which authorizes slaves to buy spirituous liquors by written permission, and that by the law as it now exists, a slave cannot buy spirituous liquors, except for the master, and then, only, in presence of the master, or upon written order of the master, and for the use of the master.”

The great object of the Legislature was to make the law on this subject so severe, as to prevent the practice of selling spirits to slaves, by which they were corrupted, and their value seriously impaired.

Section 2676 prohibits the sale of spirits to a slave, under all circumstances, even in the presence, or any kind of permission of the master, to be drank, or intended to be drank, at the place where sold. The next section forbids the sale, even where it is to be taken away, except by permission of the owner, or his agent.

The punishment for either of these offences, is, that “ the offender shall be fined, and imprisoned not less than one week, nor more than thirty days.” Section 2678. These two cases are made a misdemeanor.

Then, in the next section, a *qui tam* action is given for, from five to ten dollars, for selling spirits to a slave, “ without a written permit from the master, or person having charge of him.”

Section 2680 makes it a misdemeanor for any person to *buy* spirits “ for the use of any slave,” without “ permission of the owner.” By this, the common practice of treating slaves by the purchase of spirits for them, by the dram, or otherwise, is intended to be prohibited.

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Not being content with these prohibitions and restrictions in chapter 5, page 516, they take up the subject again in chapter 9, art. 2, page 871, section 4865, and make a more stringent and penal provision:

"Any person who *sells*, loans, or *delivers*, to any slave, except *for his owner or master*, and then only in such owner or master's *presence*, or, upon his *written* order, any *liquor*, gun or weapon, * * * * * is guilty of a misdemeanor, and shall be fined not less than fifty dollars, and imprisoned in the county jail, at the *discretion* of the Court."

This is intended to cut up the offence by the roots, and prescribes a penalty calculated to deter those that milder punishment had been found insufficient to restrain from the injury or destruction of their neighbor's property.

In view of all these provisions, we understand the law now to be substantially as laid down in the charge. That is, that under *no circumstances*, not even in the presence, or by permission, in writing or otherwise, of the master, can spirits be "*sold or delivered*," to a slave, *for his own use*, but *only* for the *use* of the master, and even in that case, the "owner or master" must be present, or send a written order, specifying that it is for himself, and the quantity to be sent. It will be seen that this law extends to everybody, and is not confined to licensed tiplors.

A general, or indefinite order, such as those exhibited in this case, is of no avail. An order can only cover a single transaction, and then it is exhausted.

The case is clearly made out, and the only error is, that the Court should have made the fine fifty, instead of five dollars.

The judgment will be affirmed.

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LOUISVILLE AND NASHVILLE RAILROAD CO. v. THE STATE.

1. **CRIMINAL LAW.** *A corporation may be indicted.* It is well settled, both in England and America, that a corporation may be indicted.
2. **SAME.** *Public roads—obstruction of, by railroad companies.* Railroad companies may be indicted and fined for obstructing a public highway contrary to the powers granted in their charter.
3. **RAILROAD COMPANY.** *Power to construct their road across a public highway.* A railroad company must, if possible, construct their road without any inconvenience to the public; but, if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent the obstruction, the company must build it in a reasonable time, and cannot delay it until their road is completed.

FROM DAVIDSON.

The plaintiff in error in constructing their road through Edgefield, made a cut across Spring street, rendering it impassable at that point. No bridge or substituted road was built to avoid this obstruction. Verdict and judgment, at the August Term, 1859, against the company, TURNER, J., presiding.

J. C. THOMPSON and N. S. BROWN, for the company.

HEAD, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

That a corporation may be indicted, has been repeatedly held in England and America, and is well settled in this State. It can no more omit its duty to individuals, or the public, than natural persons. Railway companies are liable to indictment for obstructing a public highway contrary to

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the powers granted in their act. For instance, obstructing a carriage turnpike road, by the piers of a railway bridge. So also for cutting off a public highway, and obstructing travel upon it, without, and before, constructing a substitute, in the manner required by their act. Undoubtedly, so long as the company keeps within its charter, it is not liable. As to the power which a railway company has to make a road over, or across a public highway, the law is, that if possible, the work must be constructed without any inconvenience to the public; but if it cannot be done without some inconvenience, it must be done with the least possible inconvenience. This is so, whether the obstruction of the highway be expressly prohibited in the charter or not. If a bridge, or a substituted road be necessary to prevent the obstruction, the railway company must build it immediately, or in a reasonable time, and cannot delay it till their road is completed. The company must so use their own rights as not to injure or take away the rights of others. Redfield on Railways, 515-518. *The Commonwealth of Pennsylvania v. The Erie and Northeast Railroad Company*, 27 Penn. State Rep., 339.

These authorities and principles are decisive of this case. Here the obstruction of Spring street, a public highway in the town of Edgefield, had been, according to the finding of the jury, kept up by the defendant, the Louisville and Nashville Railroad Company, for more than three years, by the intersection of the highway with its road, and when a bridge would have removed the nuisance. This it was the duty of the company to have built, not only under the general principles of the common law, but by the terms of its charter, in which it was made its duty, so to construct its road across a public road or highway, as not to impede the passage of persons, or property, along the same; and in which it was expressly prohibited from obstructing any public road, without constructing another as convenient as may be.

We do not deem it necessary in this case, to discuss the manner in which a corporation, under our practice, may be

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coerced to appear to an indictment, because it *may* appear by attorney, and did so in this case, which removes all difficulty. Note 2 to Redfield on Railways, 515, 516.

The judgment of the Criminal Court will be affirmed.

MILLER AND COUNCE v. JESSE JONES.

SALE OF REAL ESTATE. *Recovery of property paid on void sale. Tender. Contract.* If upon a void contract for the sale of land, personal property is taken in part payment, the vendor may, upon the disaffirmance of the contract, tender to the vendee the personal property received, and thus rescind the contract, as to that also; but if he fails to make such tender, the law will presume that the parties elected to affirm the contract for the property, and the price of the same may be recovered.

FROM LAWRENCE.

Verdict and judgment for the plaintiff, before Judge WALKER, at the June Term, 1859. The defendants appealed.

R. H. ROSE, for the plaintiffs in error.

GANTT and WHITTHORNE, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

In January, 1856, Jones bought of Miller and Counce a lot in Lawrenceburg, at the price of \$600. The contract was not reduced to writing, and therefore not binding on either, and was afterwards abandoned or repudiated by one, or both parties. Before this was done, however, Jones sold and de-

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livered to the vendors a wagon, at the agreed price of \$70, in part payment for the lot. This was the next month after the sale. In March, 1857, after the repudiation of the contract for the lot, and the recovery of rent against Jones for the use of the brick shop on the lot, he brought this action of assumpsit for the price agreed upon for the wagon—\$70.

The Court was requested to charge the jury that upon the repudiation of the sale of the lot, the title to the wagon re-vested in Jones, and he could only sue for a conversion of it, and that only after demand and refusal to deliver, and not upon the contract of sale for the value, or price agreed upon. This was refused; but the Court charged, in substance—

That the parol contract for the sale of the house and lot was void, and that either party had a right to treat it as a nullity; but that the contract for the sale of the wagon, though an incident of the void contract, and a part of the consideration, was not of itself void, so as to prevent the title from passing to the defendants; that upon the repudiation of the contract by Jones, the defendants might have rescinded the contract for the sale of the wagon, by tendering it back to Jones *in as good condition as when it was delivered to them*; and in that case, no action could have been maintained for the price; and that a failure to make such tender would raise a presumption that the parties had elected to affirm the contract for the wagon, and the plaintiff would have a right to recover the price agreed upon.

We think this was a correct exposition of the law, and upon the proof, the recovery by the plaintiff was right.

Let the judgment be affirmed.

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1. **SUIT.** *Dismissal of in vacation.* Code, § 8199. By the Code, § 8199, suits may be dismissed, in writing, out of term time, as well as in term. The dismissal, in vacation, puts an end to the suit, and terminates the control of the Court over it, as fully as a dismissal in term time.
2. **SAME.** *Same.* *Power of the Court after dismissal.* By the dismissal in either mode, by the voluntary act of the parties, the power and jurisdiction of the Court over the parties and the cause, are at an end, except to render a judgment for costs, or to make such orders as may be indispensable, to give effect to the dismissal.
3. **DIVORCE.** *Alimony pendente lite.* In a suit for a divorce brought by or against the wife, if she is not possessed of sufficient separate property or means of her own, adequate for her support, and to defray the expenses of the suit, she is entitled, as against her husband, to alimony *pendente lite*, and also to such amount of money as shall be necessary to defray the reasonable expenses of the suit, including counsel fees.
4. **SAME.** *Same.* *Qualification of the rule.* This doctrine is, however, subject to the qualification that the wife is prosecuting or defending the suit in *good faith*. If it be apparent that her suit is without any just or reasonable foundation, and that her cause is prompted by motives of malice, or oppression towards her husband, no allowance ought to be made to her for any purpose.
5. **SAME.** *Same.* *When suit dismissed by the wife.* When the wife voluntarily and understandingly dismisses her suit, the husband cannot, thereafter, be charged with the expenses of suit or counsel fees.

 FROM CANNON.

Appeal from the decree of Chancellor RIDLEY, made at the April Term, 1859.

J. S. BRIEN, for the counsel.

W. P. HICKERSON, for the defendant.

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McKINNEY, J., delivered the opinion of the Court.

This was a bill for divorce, by the wife, on the ground of her husband's ill treatment and threatened violence. Before an answer was filed by the husband, the complainant caused her suit to be dismissed, and furnished the money to pay the costs. In her written order to the clerk, directing the dismissal of her bill, she says, she "thought it best to pursue this course, inasmuch as there are some statements made in the bill contrary to my understanding, and different from what was intended."

At the ensuing term of the Chancery Court, and after the suit had been dismissed, the Chancellor, on the application of the complainant's solicitors, made an order that the defendant should pay to each one of the two, the sum of seventy-five dollars, as a fee for his services in preparing the bill and attending to the case, for the complainant, up to the dismissal of the suit. From this decree the defendant appealed.

It is clear that the Chancellor had no power to make any such order. First: By sec. 3199 of the Code, "suits may be dismissed, in writing, out of term time as well as in term." Under this provision, the present suit was dismissed. The dismissal, in vacation, puts an end to the suit, and terminates the control of the Court over it, as fully as a dismissal in term time. By the dismissal in either mode, by the voluntary act of the parties, the power and jurisdiction of the Court over the parties and the cause are at an end, except to render a judgment for the costs of suit, or to make such orders as may be indispensable to give effect to the dismissal. In this view, the order of the Chancellor was wholly unauthorized.

Secondly. But, this objection aside, the case was not a proper one for such an order.

According to the course of decision in this State, in a divorce case brought by or against the wife, if she be not possessed of sufficient separate property or means of her own, adequate to her support, and to defray the expenses of the suit, she is entitled, as against her husband, to alimony *pen-*

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dente lite, and also to such amount of money as shall be necessary to defray the reasonable expenses of the suit, including counsel fees. If this were not so, the wife, destitute of means of her own, would be denied justice. If, however, she has adequate means of her own, no such allowances will be made pending the suit. Bishop on Marriage and Divorce, secs. 571, 572, *et seq.*

This doctrine is subject, however, to the qualification, that the wife is prosecuting or defending the suit in *good faith*. If it be apparent, that her suit is without any just or reasonable foundation, and that her cause is prompted by motives of malice, or oppression, towards her husband, no allowance ought to be made to her for any purpose.

The husband is not liable, upon general principles of law, to defray the wife's expenses of suit, or counsel fees, in such a case. His liability arises out of the incidental power of the Court to provide for enabling the wife to prosecute or defend the suit, whenever a proper case shall be presented.

But where the wife, as actor, has voluntarily and understandingly dismissed her suit, the husband cannot be charged with her expenses of suit or counsel fees; more especially is this so, where the ground of dismissal is, the probability that the suit was unadvisedly instituted, and cannot be maintained.

Upon the merits of the case, therefore, the order charging the defendant with payment of the wife's counsel fees, was unwarranted.

The decree must be reversed.

Moses Byram v. James McGuire.

MOSES BYRAM v. JAMES MCGUIRE.

1. **DAMAGES.** *When exemplary, may be given.* In cases of fraud, malice, gross negligence, or oppression, the interest of society and the aggrieved party are blended, and the jury may award exemplary damages—such as not only to recompense the sufferer, but to punish the offender.
2. **MASTER AND SLAVE.** *Liability of master for acts of slave, or servant.* The master is liable for the acts of his slave, or servant, if the act is done by his express command, or with his approval, or in his presence, without his forbidding it; or, if it be subsequently ratified by him, whether it be for his detriment, or his advantage.
3. **SAME. Same.** *When master is said to be present.* If the master is near at hand when an act is done, although not *actually* present, and must have known that the act was being done, he is held to have been present, and liable accordingly.
4. **NEGLECT.** *When misconduct of the plaintiff will affect his recovery.* If the conduct of the defendant is the immediate cause of the plaintiff's loss, any negligence of the latter, if remote, and not at the time of the injury done by the defendant, will not affect his right of recovery.

FROM ROBERTSON.

Verdict and judgment for the plaintiff, at the June Term, 1859, PEPPER, J., presiding. The defendant appealed.

W. LOWE, for the plaintiff in error.

GARNER and GUILD, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This action was instituted by McGuire against Byram, to recover damages for the loss of his jack. The declaration has two counts: one in trover, and the other in case for negligence. The jury found for the plaintiff, and the defendant

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has appealed to this Court. The plaintiff and defendant were neighbors—residing within three-fourths of a mile of each other. The jack of the former escaped from his enclosure, and the next morning was found dead at the shop of the defendant—upon his land, and within two hundred yards of his dwelling.

The proof shows that the jack followed a jennet and colt belonging to the defendant's son to the shop, where the defendant's slaves were at work, and that they caught him and tied him to a tree near the shop, by a bridle, to keep him from doing mischief. That in the evening, about sundown, the defendant, who had been absent, came home, saw the jack tied, ascertained from his slaves how he came there, and instructed them to carry him home, which they, in his presence and hearing, and apparently with his sanction, declined to do, assigning as a reason that the plaintiff would soon be after him. He was not taken away by the plaintiff, and there is nothing to show that he was aware of his escape. Neither did the defendant send him home, or have him secured in a stable or lot. The evidence tends to show that the jack was hung, or choked to death during the night, by means of a chain attached to his neck and the tree; whether wilfully and on purpose, or from negligence and want of care, is not very distinctly disclosed. Nor does it appear, clearly, whether it was the defendant or his slaves who *actually* attached the chain to the jack; and if by his slaves, whether by his direction. But there is proof that he knew he was kept confined at the tree during the greater part of the night; and it is rendered probable, from what we see in this record, that the death of the jack, to say the least of it, was not displeasing to the defendant; he having some dislike to the plaintiff, and being the owner of a rival jack.

The proof shows further, that the fence of the plaintiff was not such as to secure the jack against escape; but that in his habits and disposition he was entirely harmless.

We think the evidence was such as to warrant the jury in *their* verdict, and the judgment of the Circuit Court must stand, unless the instructions to the jury are erroneous. This

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it is said they are, in various particulars. And first, because they were instructed that they might, in their sound discretion, give such increased damages as they thought right and proper, for any aggravating circumstances in the conduct of the defendant, if any such were shown to exist in the proof, so that they were not unreasonable, and did not evince passion or vindictiveness on their part. This instruction is sustained by *Wort v. Jenkins*, 14 Johns., 352, which was an action for beating the plaintiff's mare, of the value of \$60, so as to cause her death. The judge charged the jury that the plaintiff was entitled to recover the value of the mare, and that if they believed, as he did, that the defendant had whipped her to death, it was a case in which, from the wantonness and cruelty of the defendant's conduct, the jury had a right to give *smart money*. The jury found \$75. The charge was held right, the Court declaring they would have been better satisfied with the verdict if the amount of damages had been greater and more exemplary. Indeed, the instruction might have been stronger. || In cases of fraud, malice, gross negligence, or oppression, the law, upon authority not now to be questioned, permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. / Sedgwick, 38, 453, 465. There can be little doubt of the wilful malice, or gross neglect of the defendant,—one or the other. Moreover, we are satisfied from the proof, that the jury disregarded the instruction, as they scarcely gave the value of the jack.

Again: the Circuit Judge, after instructing the jury correctly as to the liability of the defendant, for the acts of his servants done by his order, direction, or command, or in the course of the performance of his business, and as to his non-liability for their acts or conduct, done or committed without his order, consent, command, or direction, either express or implied, charged them that if he ratified or adopted the acts or doings of his servants, when he came to a full knowledge

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of them, he thereby made them his own, though they might not originally have been so, and though he might not have ordered or commanded them to be done. This is said to be erroneous. But, as we think, it is not. It is sustained by *Caldwell v. Sacra*, 6 Littell, 118. There the death of the plaintiff's horse had been caused by sticks tied to his tail by the defendant's negro boy; the horse having frequently broken into his wheat field. Upon being informed by a witness that he had understood the horse had died from the abuse occasioned by the sticks which had been tied to his tail, Caldwell (the defendant) replied that he was glad of it. The verdict being for the plaintiff, upon a motion for a new trial, the Court said: "There is no point of difficulty in the cause. For whether the conduct of the slave was under the direction or sanction of the master, is not material; or whether the master's direction or sanction thereof is tested by his express command, or by his presence and not forbidding the act; or by other circumstances evincing his approbation, is equally immaterial. He is in either case liable; for the law is, if one agree to a trespass which has been committed by another for his benefit, this action lies against him, although it was not done in obedience to his command, or at his request. Bac. Ab., sec. 4, Title Trespass. *A fortiori*, ought the master of a slave to be liable in such a case for the trespass of the slave." And so are numerous authorities. The rule is thus stated in 2 Hilliard on Torts, 525-6: "An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority, becomes the act of the principal, if subsequently ratified by him, whether it be for his detriment, or his advantage." But it is difficult to hold, upon this verdict and these facts, that, in law, the defendant is not to be regarded as *present* at this mischief. When he came to a knowledge of what his slaves had done in his absence, he does not repudiate it, and turn the jack loose that he might go to his owner; but permitted them to retain him, and became bound, at least, to reasonable care for his safety. This reasonable care he omitted to bestow; and if he

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did not wilfully destroy him, or have it done, he suffered his slaves, whose conduct he was bound to control, in his presence, so carelessly to secure him that he became lost to the plaintiff. I say in his *presence*, because, if not actually with his slaves, the jury were authorized to believe that he was so near, and knew so well what they were doing, that he must be held to have been present, and liable accordingly. 2 Hilliard on Torts, 527-8, 535.

Neither was the plaintiff guilty of any such negligence as will repel his right to recover. Of what negligence was he guilty; and how did he, as argued, contribute to the injury? Why, simply because he did not have a better fence. But that furnishes the defendant no excuse. The misconduct of the plaintiff, if any, was very remote, and did not occur at the time of the injury; while the negligence of the defendant, to say the least of it, was the immediate cause of the plaintiff's loss; and with the exercise of prudence he might have prevented it. And certainly the argument can be of no avail to palliate a wrong inflicted by design.

Affirm the judgment.

JOHN L. BURT v. THOMPSON & WARREN.

1. PAYMENT. *Constable. Execution.* If a constable or other officer pay an execution in his hands to avoid a motion against him, he cannot thereafter run an *alias* execution, and enforce payment of the debt to reimburse himself.
2. SAME. *Same. Assumpsit.* Neither can such officer sue the original

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debtor in *assumpsit*, and recover the amount so paid. It being a voluntary, officious payment, the law does not imply a promise, upon which to found the action.

FROM BEDFORD.

This cause was tried at the August Term, 1859, DAVIDSON, J., presiding. The plaintiff appealed.

WISENER and BURTON, for the plaintiff.

E. & H. COOPER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This case was before us at last term in another aspect. Burt, as constable, had in his hands an execution in favor of Lintz, against these defendants, which he failed to return in the thirty days allowed by law. Lintz was about to move against him for this default, and to avoid this, he paid up to him the amount of the execution. He then returned the process "not satisfied," and took out an *alias* in favor of Lintz, against the defendants. The execution was superseded and quashed, and the judgment affirmed by this Court at the last term.

In a written opinion not yet published, we held, that a voluntary payment by the officer, without any transfer or agreement, extinguished the judgment. But it would be otherwise if the payment by the officer had been compulsory by judgment against him. This is in conformity to the case of *Harwell v. Worsham*, 2 Hum., 524, and the principles settled in *Smith v. Alexander*, 4 Sneed, 482. The act of 1850, ch. 145, is declarative of the same principle. It gives the officer the right to use the judgment for his own benefit, where a judgment has been obtained against him for his default, and he has paid the same. Such was the law before, as was de-

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declared in the case in 2 Hum. But the remedy is not further extended by the Legislature. They confine the remedy to the case of compulsory payment by the officer.

The plaintiff having failed as above stated, then commenced this action of *assumpsit* against the defendants for money paid for their use, &c., and was again defeated in the Circuit Court. Though it would seem that honesty and justice would require the defendants to reimburse him, for discharging their debt, yet we are aware of no principle upon which they can be forced to do so. Indeed the doctrine of all the cases referred to forbid it. The decision in 2 Hum., as well as that of last term, were upon cases where the discharged judgments or executions upon them, were attempted to be used by the officer for his benefit. But this case brings up the question of liability of the original defendants in a different form.

We think, however, that it is clear, that there is no liability at all to the officer, unless he can use the same judgment, and that we have seen cannot be done, except where he has been compelled, by law, to pay the judgment against him. He cannot recover upon common law principles, because it is an officious, voluntary, payment for others, without their request. He cannot compel these defendants to become his debtors against their will, or without their consent. This is one of the elementary principles of the law, and does not require authorities. But the question comes up here in the very worst form for the plaintiff. He is in official default, and pays the money, not to favor the defendants, or in pursuance of any request from them, but to save himself from the debt and penalty under the statute, for his dereliction of duty.

There is no principle by which he can recover, and the policy of the law is against it. He is not entitled to claim indemnity from any quarter, for losses sustained by palpable neglect of official duty.

Let the judgment be affirmed.

George W. Thompson *et al.* v. James Pyland *et al.*

GEORGE W. THOMPSON *et al.* v. JAMES PYLAND *et al.*

1. **LIEN—VENDOR'S.** *Assignment of the purchase money.* Where the legal title to land sold has been conveyed to the purchaser, the assignment or transfer by the vendor to a third person, of a note taken for the purchase money, does not carry with it to the latter the implied lien of the vendor.
2. **SAME.** *Same.* But where the vendor has not parted with the legal title, or where he has taken a mortgage, or has retained an express lien by agreement, the lien accompanies the assignment of the purchaser's note for the purchase money.
3. **SAME.** *Same.* If the purchaser of real estate execute his notes for the purchase money, and receive a deed, which, on its face, reserves an express lien for the security of the same, the effect of such provision is to create an *express* lien, which follows the notes in the hands of the assignee.
4. **SAME.** *When part of the lands have been sold by the purchaser.* If real estate is sold, and notes given for the purchase money, and the purchaser subsequently sells a portion of the same, reserving to himself a part which he afterwards sells, the first purchaser has a right to insist that the lands of the last purchaser shall be *first* subjected to the discharge of the vendor's lien.
5. **QUIA TIMET.** *Chancery jurisdiction. Anticipated injury. Case in judgment.* Bills, *quia timet*, are maintained to prevent anticipated injuries, and not merely to redress them when done. Thus, if a vendee sells portions of a tract of land to different purchasers, the vendor's lien not being extinguished, the first purchaser has a right to compel the extinguishment of such lien by a sale of the other portion of the land, and he may file a bill, *quia timet* before he has paid, or been called on to pay the debt due to the vendor, or his assignee.

FROM BEDFORD.

Decree for complainants, at the August Term, 1859, before
Chancellor RIDLEY.

HENRY COOPER, for the complainants.

W. H. WISENER, for the defendants.

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McKINNEY, J., delivered the opinion of the Court.

It appears from the pleadings and proof in this cause, that in the year 1854, one Newcomb Thompson purchased from Gant a tract of land, in Bedford county, of about 480 acres, and took a deed of conveyance for the same, which, on its face, reserves an express lien for the security of the purchase money; for which the purchaser executed his notes. One of said notes, for \$1500, still remains unpaid; and has, it seems, been transferred to the defendant, James A. Gant.

It further appears, that on the 14th of October, 1854, Newcomb Thompson sold and conveyed a portion of said tract, containing 320 acres, to the complainant, Thompson; and the latter, on the 24th of November, 1855, sold and conveyed 49 acres of his purchase, to the other complainant, Dameron.

It likewise appears, that on the 5th of April, 1856, said Newcomb Thompson sold and conveyed the residue of the tract purchased from Gant, to the defendant, Pyland, who afterwards sold about 40 acres thereof to the defendant, O'Neal.

The complainants brought this bill for the purpose of having the vendor's lien extinguished, and to this end, the holder of the note for the unpaid purchase money, is joined as a party defendant. The bill assumes, that the portion of the tract last sold by Thompson to Pyland, is, primarily, chargeable with the debt of \$1500, the unpaid purchase money; and it is alleged, that the defendants, in anticipation of this charge falling upon their part of the land, are wasting and selling off the timber, which constitutes, in a considerable degree, the value of the property.

The first question to be considered, is, does a lien exist in this case? From the statement in the record, we must assume, that the note for the purchase money remaining due, was transferred by the vendor to James A. Gant, the defendant.

We have held, that, where the legal title has been conveyed to the purchaser, the assignment or transfer by the vendor, to a third person, of a note taken for the purchase money, does not carry with it, to the latter, the implied lien of the vendor.

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Green v. Demoss, 10 Hum., 371. But, on the other hand, where the vendor has not parted with the legal title; or where he has taken a mortgage, or has retained an express lien, by agreement, it is equally well settled, that the lien accompanies an assignment of the purchaser's note for the purchase money.

The only inquiry, then, upon this point of the case, is, whether the effect of the provision in the conveyance from the original vendor to Newcomb Thompson, was to create an express lien, by contract or agreement of the parties? and we think it was.

Secondly. It is argued for the defendants, that, inasmuch as the complainants have neither paid, nor been called on to pay, the debt due to the vendor or his assignee, they cannot, for that reason, maintain this bill.

We do not assent to this conclusion. We are of opinion that, although no actual injury has as yet been sustained by the complainants; but, from the peculiar relation between the parties, an injury may be apprehended in future. They may seek the aid of a Court of Equity, by a bill *quia timet*, to prevent the anticipated injury. According to the course of decision of our Courts, the complainants have a right to insist, that the lands of the defendants shall be first subjected to the discharge of this incumbrance, in exoneration of their own lands. And if the vendor, or his assignee, will not voluntarily proceed to have the lien discharged, shall the complainants be compelled to stand by, until the lands primarily chargeable with the burden of the lien, may become so depreciated in value, by the commission of voluntary waste, or otherwise, as that the charge may, possibly, to some extent, at least, be thrown upon them? We think not. In the absence of any adjudication directly in point, it seems to us that, in analogy to the case of a surety, the present bill may well be sustained. A creditor is not bound, in general, to active diligence in collecting his debt, yet it has been held, that, after the debt has become due, the surety may file a bill *quia timet*, to compel the creditor to sue for and collect the debt from the

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principal. 1 Story's Eq., secs. 327, 730, 826. Numerous other analogies might be drawn from the principles applicable to bills *quia timet*, if necessary. Bills of this character are maintained to prevent anticipated injuries, and not merely to redress them when done. The party seeks the aid of a Court of Equity, because he fears some future probable injury to his rights or interests; and not because an injury has already occurred, which requires any compensation or other relief. 1 Story's Eq., sec. 826.

These principles, we think, amply sustain the bill.
Decree affirmed.

WILLIAM D. ROBINSON v. JOHN A. WILLIAMS *et al.*

REGISTRATION. *Title bond. Assignment. Transfer.* The transfer of a title bond may be by a simple delivery, or an assignment in writing. Such a transfer, when the consideration is paid or properly secured, puts the estate beyond the reach of the creditors of the party making the transfer.

FROM DAVIDSON.

Decree for the defendants, at the November Term, 1859,
Chancellor FRIERSON presiding.

BRIEN & COX, for the complainant.

FOSTER, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The complainant, as a judgment creditor of John A. Williams, seeks to subject to the satisfaction of his debt the

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equitable estate which he alleges he has in a tract of land. The facts of the case are: John A. Williams purchased this land of one Bysor; paid him part of the purchase money down, and undertook to pay the residue at a certain time thereafter, and took his title bond for a conveyance of the land upon the completion of the payment of the purchase money. Afterwards, and before he had taken any deed, or paid the remaining purchase money, he sold this land to his brother, Michael A. Williams, and assigned and delivered to him the bond for title upon Bysor. The assignment was in writing, on the back of the bond, signed by John A. Williams; and after a transfer of all his right, title, and interest in the bond, there was a direction to Bysor to make the deed to Michael A. Williams. There was no other writing between them. As a consideration for this purchase, Michael A. Williams paid John A. Williams \$460, in a note upon James and Gilbert Marshall, and agreed to pay Bysor the unpaid purchase money. Bysor was soon thereafter made acquainted with the assignment and delivery of this bond, and that Michael A. Williams was to pay him, and gave his sanction to the arrangement; but has never yet executed a deed to him, nor has the former been paid.

After these things had taken place, the complainant became a judgment creditor of John A. Williams, and filed this bill. He asks to reach this land upon two grounds: 1st, that the assignment to Michael A. Williams was made to hinder and delay creditors, and is, therefore, void; 2d, that neither the title bond or assignment were registered until after he had filed his bill, and on this ground he must be let in, as against the assignment. To these positions we answer, that from an examination of the pleadings and proof in the cause, we are satisfied the assignment is not fraudulent, and that John A. Williams, at the time of the filing of this bill, having no interest in this estate, complainant can have no relief. And as to the question of registration, we need only refer to the case of *Wilburn et als. v. Spofford, Tileston & Co. et als.*, 4 Sneed, 698, 706, as authority to show that the registry laws

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can have no application. The transfer of a title bond may as well be by a simple delivery as by an assignment in writing. Such a transfer, where the consideration is paid or properly secured to be paid, puts the estate beyond the reach of the creditors of the party making the transfer. This is so upon general principles of the common law. *Chapron & Nidelete et al. v. Cassaday et al.*, 3 Hum., 661, 665. The complainant is not a creditor of Bysor, but of John A. Williams, and the non-registration of the title bond is a matter wholly immaterial to him. He must invalidate the assignment, or he fails. This he cannot do—there being no fraud in the transaction, and the registry laws being out of the case.

The Chancellor took this view of the case, and without the consideration of other questions which might lead to the same result, we affirm his decree.

JACOB KNOTT *et al.* v. WILLIAM CARPENTER *et al.*

LIEN—MECHANIC'S. *Improvements made on the lands of a feme covert.*

The husband cannot himself charge the real estate of his wife for money expended by him in making improvements thereon; neither can a mechanic who expends his money and labor on the wife's property, at the instance of the husband alone. In such a case the mechanic's lien cannot be enforced.

FROM BEDFORD.

Decree for the complainants, by Chancellor RIDLEY, at the August Term, 1859. The defendants appealed.

E. & H. COOPER, for the complainants.

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WHITESIDES, DAVIDSON, and REID, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was a bill to enforce a mechanic's lien. It seems that, by contract with the defendant, William Carpenter, the complainants furnished materials and erected a dwelling house for the former, on a lot in the town of Shelbyville; for which, as they allege, there remains due to them about the sum of \$525, which they seek to enforce the payment of by a sale of the property.

The bill alleges, that at the time of the contract with the complainants for the building of said house, the lot was *claimed* by said Carpenter and wife. The proof, however, establishes that sometime before the contract, one William Brown, for a valuable consideration, made an absolute conveyance in fee of said lot to the defendant, "Abigail Carpenter and the heirs of William Carpenter, her husband, and their heirs and assigns forever." This conveyance bears date the 20th of September, 1856, and it appears to have been duly acknowledged and registered on the same day; and its validity is not questioned. It does not appear that Mrs. Carpenter had any participation whatever in the contract; nor is there any imputation of fraud or bad faith, so far as she is concerned.

The Chancellor, upon the foregoing facts, decreed that the complainants had a lien on the house and lot, and directed a sale. This decree is clearly erroneous.

It is unimportant, as respects the determination of this case, whether the conveyance from Brown shall be held to vest the title in Mrs. Carpenter *alone*, or in her and the children of the marriage with William Carpenter, *jointly*; and we intimate no opinion upon the question. In either view, no lien can exist in complainants' favor. The husband had no title; and of this fact there is ground to infer that the complainants had actual knowledge at the time of the contract. But whether so or not, they had constructive notice, from the reg-

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istration of the conveyance from Brown, and that is sufficient—if the fact of notice were material.

If the complainants thought proper to trust alone to the lien given by statute for the security of their debt, it was incumbent on them, at their peril, to inquire into the title. The husband cannot himself charge the real estate of the wife, for money expended by him in making improvements thereon. *Marable v. Jordan*, 5 Hum., 417. Neither can a mechanic who expends his money and labor on the wife's property, at the instance of the husband alone.

Nothing short of a conveyance by the wife jointly with her husband, in the mode prescribed by the statute, would divest the wife of her title to the lot in question. She has no power to charge it, by the terms of the conveyance to her from Brown.

Since the act of 1849–50, ch. 36, the husband's interest, by the common law, in the real estate of the wife, cannot be subjected in any mode whatever, during her life, by the creditors of the husband; nor can the husband, during the wife's life, make any disposition of it without her joining therein.

The decree will be reversed, and the bill dismissed.

HENRY FINNEY v. THE STATE.

1. **CRIMINAL LAW. Bigamy. Unlawful cohabitation.** Code, § 4839. By the Code, § 4839, a party cohabiting with a second husband or wife, the former husband or wife being alive, is guilty of a felony. This is a distinct offence from that of bigamy, created by the same section.
2. **SAME. Same. Same. Venue. Constitutional law.** By the Constitution, the accused has a right to be tried in the county where the offence is committed. On an indictment for bigamy, the trial should be in the county where the second marriage takes place. For an un-

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lawful cohabitation, the party can be tried in any county where the parties unlawfully cohabit.

3. **EVIDENCE.** *Bigamy.* *The second wife a competent witness.* The second wife is a competent witness on the trial of her husband for bigamy, or unlawful cohabitation.
4. **SAME.** *Same.* *Declarations of the defendant.* *Production of the marriage license.* The declarations and confessions of the defendant as to the first and second marriages, are competent evidence without producing the marriage license, or an eye witness.

FROM WAYNE.

The plaintiff in error was convicted at the September Term, 1859, WALKER, J., presiding, and appealed.

JAS. H. LEWIS, for the plaintiff in error.

HEAD, Attorney General, for the State.

CARUTHERS, J., delivered the opinion of the Court.

The indictment and conviction were for bigamy, or cohabitation after that offence, under the Code, sec. 4889.

“If any person being married shall marry another person, the former husband or wife then living, *or continue to cohabit* with such second husband or wife in this State, such person shall be imprisoned in the penitentiary not less than two, nor more than twenty-one years.”

Neither the first nor second marriage was in the county of Wayne, where the accused was indicted and tried. The first count is for bigamy, and the second for cohabiting in Wayne, after the offence of bigamy had been committed in another county.

The first question is upon the venue. By the Constitution, the accused has a right to be indicted in the county where the offence was committed; and we held at this term, that this right cannot be infringed, even by the Legislature. However,

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this question may have been decided before the Code, or by the common law, it is now, under the Code, only a matter of construction. We think it clear, that by this section, "to continue to cohabit with such second husband or wife, in this State," is a distinct and complete offence, and as much cognizable in the county where it occurs, as the crime of bigamy is in the county where the second marriage took place. The offender could not be charged for the latter crime in any other county than that where it occurred; but, as to the former, it may be in a different county, and must be located by the facts, as well as the other. They are two distinct offences. To make out the case for unlawful cohabitation, the offence of bigamy must be proved by establishing both the marriages, and that at the time of the second, the former had not been dissolved by divorce, or death, either actual or presumed. This new offence was created to prevent the scandal and evil examples of permitting men and women to cohabit in any community of this State, upon an unlawful second marriage, when the first, as well as the last, or either, may have taken place in any other State or county. But let the reason be what it may, the creation of the new offence is clear and explicit, and the law must be enforced.

Second. It is insisted that illegal evidence was admitted on the trial. We think differently. 1. The so called second wife was allowed to be introduced to prove the cohabitation in Wayne. She was competent by all the authorities, after the first marriage; and also that the first wife was still alive, was proved. 2. Again, the declarations and confessions of the defendant, as to the first and second marriages were allowed to be proved, without the production of the license, or accounting for their non-production, or the introduction of any eye witness, of either marriage. This is also settled by the Code, sec. 4841, without reference to other authority, in favor of the ruling of the Court.

There is no error in the case, and the judgment must be affirmed.

Joel A. Battle v. Lea Shute *et al*

JOEL A. BATTLE v. LEA SHUTE *et al*.

USURY. *When creditor may recover it. Judgment. Act of 1844, ch. 182.*

Under the act of 1844, ch. 182, a creditor or surety, before he can sue, either at law or in equity, to recover usury paid by his debtor or principal, must establish his demand by judgment or decree. The party paying the usury, or his personal representative, may sue as owner.

FROM DAVIDSON.

This cause was tried at the May Term, 1859, before Chancellor FRIERSON.

J. B. WHITE, for the complainant.

A. L. DEMOSS, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The complainant alleges he is the creditor of Smiley, and that the defendant, Lea Shute, had taken and received usurious interest from him; the object of the bill is to recover the same in satisfaction of his debt. The Chancellor was of opinion complainant was entitled to relief, and so decreed. We do not see how we can sustain this decree. The act of 1844, ch. 182, provides that securities and creditors shall have the right in law or equity, to recover from any person who may have received usurious interest from the principal or debtor, the amount so received over and above lawful interest, in satisfaction of their debt or liability; and such unlawful interest in the hands of the usurer, shall be in all cases a fund to satisfy *bona fide* creditors and securities; provided they shall, before they bring suit under the provisions of this act, be judgment creditors.

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The substance of this act is taken into the Code at section 1955, in these words: "If usurious interest have been paid, the same may be recovered by action at the suit of the party from whom it was taken, or his representative; or it may be subjected, by any judgment creditor of such party, to the satisfaction of his debt."

Now we apprehend that no creditor or security has made out a *title* to recover the usury until he has established his demand by judgment at law, or decree in equity. And that until this is done, his bill, or suit, for the usury, is wholly unwarranted. The debtor from whom the usury was taken, or his representative, may sue as *owner*; but what *title* has one alleging himself to be a creditor, until he has established his demand by judgment or decree? None that we can perceive. *Woods v. McGavock*, 10 Yer., 133, 140; *Esselman v. Wells and Ewing*, 8 Hum., 482, 487.

The Chancellor was, no doubt, of this opinion, as the decree states the fact that the complainant was a judgment creditor of Smiley. But the assumption is unwarranted by anything in this record. The bill shows the contrary. It is, to be sure, stated that complainant, as the accommodation security or endorser of Smiley, in several judgments which had been rendered against them in the Circuit Court of Davidson county, had paid various sums of money, and that no part of the same had been repaid to him. And this is the extent of the allegation upon the subject. From this it will be seen that complainant is only a creditor by simple contract, and not by judgment. We are constrained, therefore, without considering the question of usury made in the record, to reverse the decree of the Chancellor.

Johnson & Draper v. Charles C. Price.

JOHNSON & DRAPER v. CHARLES C. PRICE.

1. **CHANCERY JURISDICTION.** *Demurrer.* If there is no demurrer to a bill, the Chancellor, under the statute, has jurisdiction to hear and determine the cause upon the same principles that would govern a court of law.
2. **ACCOUNTS.** *Proof of, under the book-debt law. Evidence.* If a party avail himself of the statute authorizing him to prove his account by his own oath, he voluntarily places himself in the condition of a witness, and the defendant is at liberty to contest his evidence, and oppose the same by other legal evidence.

FROM JACKSON.

This cause came up from a decree of Chancellor RIDLEY, overruling an exception to the Master's report.

DENTON, for the complainant.

J. P. MAURY, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This cause was brought here upon an exception to the Master's report, taken by the defendant; which was disallowed by the Chancellor.

The complainants having failed to establish their mercantile account, as to a portion of the items, by the discovery obtained from the defendant, presented an affidavit verified by the oath of one of the partners, in which it is stated that they have no means of proving the delivery of such articles as they now propose to prove by their oath, but by their books; that their books contain a true account of all the dealings between them and the defendant; and that they have given the defendant all just credits.

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They further state that defendant is still largely indebted to them; that there is more than seventy-five dollars justly due them from the defendant, over the amount stated in the Master's report.

On this affidavit alone, as appears from the record, the Master made a charge against the defendant of \$75, as "proved under the book-debt law." To this item defendant excepted, but the exception was disallowed. In this the Chancellor erred. The affidavit was not admissible evidence.

There being no demurrer to the bill, the Chancellor was at liberty, under the statute, to hear and determine the cause upon the same principles as in a court of law. In this view, perhaps, the complainants might have been allowed to avail themselves of the act of 1756, ch. 4, sec. 2, known as the *book-debt law*, upon making out a case strictly within its provisions. The substance of this act has been incorporated in the Code, secs. 3780 to 3785.

But the proceeding in the present case is wholly at variance with the statute. There is no specification, either in the affidavit or accompanying it, of the items making up the sum of \$75, proposed to be proved. The complainants are permitted to swear to *so much* of a larger amount, and to charge the defendant in gross, without showing to what portion of their account the charge applies. This cannot be allowed.

But again: By availing himself of the statute, the complainant, Draper, who made the affidavit, voluntarily placed himself in the condition of a witness. By the express terms of the act, "the defendant shall be at liberty to contest the plaintiff's evidence, and oppose the same by other legal evidence." The defendant had the undoubted right to cross-examine the complainant as to each item of the account making up the sum proposed to be proved; the articles delivered, time, place, person to whom delivered, price, and every material fact. But of all this he was deprived by the irregular and unauthorized mode of proceeding in this case.

The rule laid down in *Goodner v. Browning*, 9 Hum., 788, applies only to a defendant called on to account. And under

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this rule the defendant can only *discharge* himself—he cannot *establish a charge* against the complainant in that mode.

The decree must be reversed, the exception allowed, and the case re-committed to the Master.

GIDEON ANDERSON v. W. S. SAYLORS.

1. JUDGMENT. *Payment of, by one joint defendant. Execution.* The satisfaction of a judgment by one of the joint defendants, is an extinguishment of it as to all of the defendants, so that no execution can afterwards be issued thereon.
2. CONTRIBUTION. *In damages for a tort.* In a recovery against several defendants of damages for a *tort*, no right of contribution exists in favor of either, whatever may have been the nature of the case, or the apparent right of the one on principles of natural justice to have such contribution, or to throw the entire satisfaction of the judgment on the other party.

FROM PUTNAM.

His Honor, Judge FITE, quashed the execution, and Anderson appealed.

COLMS, for Anderson.

SAML. TURNEY, for Saylor.

MCKINNEY, J., delivered the opinion of the Court.

This was an application to quash an execution, on the ground that the judgment had been satisfied before its issuance.

It appears, that a joint judgment had been recovered be-

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fore a justice, for \$38.60, against Anderson and Saylor, in favor of one Crowder, in an action of *trover*. Sometime after judgment, by an arrangement between Crowder and Saylor, the latter fully satisfied said judgment; and, thereupon, procured the issuance of an execution thereon, for the purpose of collecting the amount of the judgment, for his own benefit, from his co-defendant. Whether or not, in equity, Anderson ought to have been compelled to satisfy said judgment; and whether or not the judgment was improperly rendered against Saylor by the justice, are questions that cannot now be entertained. The judgment was acquiesced in, and remained in force, and cannot be collaterally impeached.

And it is too clear to admit of discussion, that its satisfaction, by one of the joint defendants, was an extinguishment of the judgment as to all the defendants, so that no execution could afterwards be issued thereon. And it is equally clear, that the recovery against the defendants, being in damages, for a *tort*, no right of contribution could exist in favor of either; whatever may have been the nature of the case, or the apparent right of the one, on principles of natural justice, to have such contribution, or to throw the entire satisfaction of the judgment on the other party.

Judgment affirmed.

A. B. CHEATHAM v. M. M. BRIEN.

1. **STAYOR.** *When liable.* *Justice's office* The place where an official act is done by a justice, is his office for that particular purpose, no matter where it may be, so that it is within the territorial limits of his jurisdiction. Hence, if a justice render a judgment and receive stay surety at a place different from his usual place of business, the stayor is bound.

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2. **PRINCIPAL AND SURETY. Stayor. Execution.** *The property of the principal must, first, be exhausted.* Code, § 8028. It is the duty of an officer having an execution, to exhaust the property of the principal, both real and personal, before proceeding to sell the property of the surety, or stayor.
3. **SAME. Same. Same.** *When the property of the principal is encumbered.* If the property of the principal be encumbered, or in custody of the law, or if by the death of the principal it cannot be reached without reviving the judgment against the personal representative, or for any other cause is not amenable to the immediate requirement of the process in the officer's hands, it is his duty to proceed at once against the property of the stayor or other surety.
4. **EXECUTION. Death of the principal. Revivor.** The death of one or more defendants in a judgment, interposes no obstacle to the issuance of an execution without reviving the judgment. The execution is issued in the usual form, and it is the duty of the officer to proceed to collect the debt from the surviving defendants.

FROM DEKALB.

This cause was tried before his Honor, Judge FITZ. Cheatham appealed.

ROBERT CANTRELL, for the plaintiff in error.

J. C. STONE, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

Brien obtained a judgment against James a Durham for \$105, before a justice of the peace, who entered the name of Cheatham, as *stayor* of the execution thereon. After the expiration of the *stay*, execution was issued against the principal and stayor, and was levied, by the officer, on the property of the latter.

By an indorsement made upon said execution, by the attorney of Brien, it appears that Durham, the principal, was dead; and it seems that his death occurred before the levy was made, and probably before the issuance of the execution.

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Cheatham presented a petition for a *supersedeas*, and therein asks to have said execution quashed, on two grounds: 1st. That he was not legally bound as stayor; and 2d. That his property was protected from execution until after the property of his principal was exhausted.

It seems that the justice was in Smithville, a distance of four miles from his residence, when Durham voluntarily came before him, and confessed judgment in favor of Brien; and at the same time and place, Cheatham, in like manner, appeared before him, and agreed to become bound as surety for the stay of execution on said judgment. The justice, either before leaving town, or on his return home, entered up the judgment, and also entered the name of Cheatham as stayor.

The objection taken to this proceeding is, that it did not take place at the justice's office. There is nothing in this objection. We have held in another case, at the present term, that *the place where an official act is done* by a justice, is *his office for that particular purpose*; no matter where it may be, so that it is within the territorial limits of his jurisdiction.

The other ground assumed in the petition, is likewise untenable. It is based upon a mistaken construction of the Code, sec. 3028. That section provides, that "where the judgment or decree is against a principal and his surety, it shall be the duty of the officer having the collection thereof, to exhaust the property of the principal, both real and personal, before proceeding to sell the property of the surety."

This provision, by the following section, embraces "stayors:"

This provision, it will be observed, is directory to the officer. *Atkinson v. Rhea*, 7 Hum., 59. And it plainly contemplates, that the principal shall be possessed of property subject to immediate execution, on which the officer may directly proceed to make a levy, without the risk of personal liability, and without the necessity, on his part, of resorting to any legal measures for the removal of any obstacles which may exist in the way of an immediate seizure of the property. Consequently, if the property of the principal be encumbered,

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or in custody of the law ; or, if by the death of the principal, it cannot be reached without reviving the judgment against the personal representative ; or, for any other cause, is not amenable to the immediate requirement of the process in the officer's hands, he not only may, but it is his positive duty, to proceed at once against the property of the stayor, or other surety. He must be careful, however, at his peril, not to pass by the property of the principal, if it be accessible.

It was not the intention of this provision of the Code, that the creditor should be subjected to the trouble and delay of removing legal obstacles out of the way of a levy on the property of his principal debtor, before being permitted to subject the property of the surety. In such case, it was deemed more reasonable and just, to leave the surety, who had voluntarily made himself liable for the satisfaction of the judgment, to take upon himself this expense and trouble, should his own indemnity require it.

The death of the principal after judgment, interposes no objection to the issuance of an execution, without reviving the judgment. *Cabiness v. Garrett*, 1 Yer., 491.

It follows, therefore, that the *certiorari* must be dismissed, and the *supersedeas* discharged. And judgment will be entered up here against the principal and surety in the *certiorari* bond, for the amount of the justice's judgment, with interest at the rate of twelve and one-half per cent. per annum thereon, pursuant to sec. 3187 of the Code.

Judgment modified accordingly.

John T. Neil *et al.* v. Beaumont, Vanleer & Co.

JOHN T. NEIL *et al.* v. BEAUMONT, VANLEER & Co.

SUMMARY PROCEEDING. *Motion. Constable. Execution, return of.* An officer is not liable to a judgment by motion, for the non-return of an execution, if within the time given by law for its return his term of office expires.

FROM BEDFORD.

Judgment by motion, at the December Term, 1858, DAVIDSON, J., presiding.

WISENER, for the plaintiffs in error.

E. & H. COOPER, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

This was a motion for judgment, before a justice, against Neil, a constable, and his sureties, for his neglect to return a justice's execution, in favor of defendants in error, within thirty days.

On the 17th of March, 1858, the execution was placed in the hands of Neil; and on the 7th day of April following, he ceased to be a constable, by the expiration of his term of office. The record does not show that Neil made any levy under said execution; or that he handed it over to another officer; or took any step in execution of the process. All we know is the simple fact, that on going out of office in less than thirty days after its reception, he did not return it to the office of the justice by whom it was issued.

For his failure to do so, the justice rendered judgment against him and his securities; and on appeal to the Circuit Court, the justice's judgment was affirmed.

This judgment is erroneous. We are not called on to de-

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termine what was the duty of the constable, under the circumstances; nor what is the proper remedy of the plaintiffs in the execution, in such a case. The question for us at present is, can the summary remedy, by motion, be sustained? We feel clear that it cannot. Within the "thirty days" given for the return of the execution, the official term of the constable expired; and with its expiration, his power to act under the execution ceased to exist, from anything appearing to the contrary in this record. The statute does not contemplate such a case as this. See Code, secs. 8024, 8594.

Judgment reversed.

MARTHA JOHNSON v. JEAN KIMBRO *et al.*

1. PARTITION. *Cannot be made by a foreign court. Conflict of laws.* A foreign court cannot, by its judgment or decree, pass the title to land situate in another country; and, consequently, a partition of lands lying in this State cannot be made by the courts of another State.
2. CONFLICT OF LAWS. *Chancery. Jurisdiction. Specific performance.* A court of equity, acting in *personam*, may entertain a bill for the specific performance of a contract respecting land situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court.

FROM HICKMAN.

Verdict and judgment for the plaintiff, WALKER, J., presiding.

GAUTT, for the plaintiff.

D. CAMPBELL, for the defendants.

Martha Johnson v. Jean Kimbro *et al.*

MCKINNEY, J., delivered the opinion of the Court.

This was an action of ejectment, brought by the plaintiff, Martha Johnson, to recover a tract of land of 640 acres, situate in Hickman county.

To establish her title, the plaintiff offered in evidence the transcript of a record of the Superior Court of law of Hillsborough District, North Carolina, purporting to be a proceeding for the partition of the real estate of Thomas Pearson, deceased, the uncle of the plaintiff.

It appears from the proof, that said Thomas Pearson died intestate, and without issue, in North Carolina, in the year 1800. He was the owner, at the time of his death, of a large real estate, situate partly in Tennessee, but chiefly in North Carolina. In 1802, his heirs at law, including the plaintiff and her husband, William Johnson, who was then living, filed their petition in the court before mentioned, for the division amongst them of the lands lying in North Carolina; no mention being made in the petition of the lands in Tennessee. Commissioners were appointed, according to the prayer of the petition, who proceeded to make partition as well of the lands in Tennessee, as of the lands in North Carolina; and to the plaintiff and her husband jointly, was allotted, among other lands, the tract of 640 acres lying in Tennessee, in controversy in the present action.

The report of the division was returned by the commissioners; and the transcript of the record shows that, at the April Term, 1805, "On motion, it was ordered by the Court, that the said report be confirmed, and that the same be recorded." There is no decree, vesting the title in the heirs, in severalty, to the lands allotted to them respectively.

It further appears that the *coverture* of the plaintiff continued till 1852, when William Johnson, her husband, died; and this action was commenced in less than three years from the time of his death.

His Honor, the Circuit Judge, instructed the jury, that the proceeding of the Court of North Carolina, partitioning

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the lands amongst the heirs of the intestate, was inoperative to vest the plaintiff with a title *in severalty* to the entire tract of land in Tennessee, sued for in this action; but that she was entitled to recover her fractional share of said tract, as one of the heirs at law of the intestate; and the jury found accordingly.

This instruction was unquestionably correct. Passing by the want of authority on the part of the commissioners, to make partition of the lands in Tennessee, which were not embraced in the petition, it is a well established principle of international law, "that a foreign court cannot, by its judgment or decree, pass the title to land situate in another country." Story's Conflict of Laws, sec. 543.

It is certainly true, that a court of equity may entertain a bill for the specific performance of a contract respecting land situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court. In such case, although the court cannot bind the land itself by the decree, it can bind the conscience of the party in regard to the land, and enforce him, by process against his person, to perform his agreement. But the decree is merely *in personam*, and not *in rem*. Still, the want of power to act upon the land, or to enforce the decree *in rem*, is no objection to the jurisdiction to act upon the person, and in that mode compel an execution of the contract according to equity and good conscience. 2 Story's Eq. Jur., secs. 743, 744.

But this does not help the plaintiff's case. The proceeding of the Court of North Carolina, if it be anything, is purely a proceeding *in rem*. What would have been the legal effect of a decree of the court, based upon the partition, divesting and vesting the title, in severalty, pursuant to the allotments made by the commissioners, we need not now stop to consider, as no such decree seems to have been made. There is no error in the record.

Judgment affirmed.

Thomas W. Brents and Wife v. William Brown *et al.*

THOMAS W. BRENTS AND WIFE v. WILLIAM BROWN *et al.*

1. CHANCERY JURISDICTION. *Will. Legatees. Division.* If the proceeds of notes are bequeathed, and the legatees agree to divide the notes before collected, a portion of which prove to be insolvent, the other legatees will be required to refund to the legatee receiving the insolvent notes, their ratable part of the same.
2. SAME. *Mistake. Fraud.* If, at the time said notes are divided, the parties are of opinion they are all good, and it turns out to be otherwise, the loss is the result of a mistake, from which the other legatees derived a benefit, and a Court of Equity will grant relief, although no fraud intervened.

FROM BEDFORD.

Chancellor RIDLEY pronounced a decree for the defendants at the August Term, 1859, from which the complainants appealed.

E. A. KEEBLE, for the complainants.

WISENER and E. & H. COOPER, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant, Elizabeth Brents, prior to the marriage with her co-complainant, in December, 1857, was the widow of one Benjamin Brown, who died in the early part of that year, in Bedford county.

Said Brown was possessed of a large estate, which he disposed of by his last will and testament, consisting in part, of notes and obligations for the payment of money due to him, to the amount of about thirty thousand dollars, in regard to which the will contains the following provision: "The balance of my estate, either money on hand, or notes,

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or obligations for money, when it is collected, I want the same to be equally divided between my daughter, Emeline Norvill, and my wife, and my sons, Henry, William, Spencer and John, this clause of my will is only to include money, or notes, when collected."

The executors, after their qualification, were desirous to avoid the responsibility of collecting the notes, and thought it best for the several legatees, all of whom were of full age and free from disability, that they should be divided out amongst them, so that each one might see to the collection of his own share of the notes; and this arrangement was proposed by the executors, and assented to by all the legatees; and in pursuance thereof, an equal division was made between them of the notes, all of which, thus divided, were believed to be good at that time.

It turned out, however, not long after, that certain of the notes allotted to the widow were worthless, owing to the failure of the makers. It is admitted by the executor, Wisener, who proposed and carried into effect this arrangement, and who seems to have acted in the whole matter with the utmost fairness and good faith, that he represented to the widow, that the notes which proved to be of no value, were perfectly good, and he then so believed. But there is some testimony tending to show, that the other executor, Brown, who was one of the legatees, was aware, before the death of the testator, that the makers of said notes were thought to be of doubtful solvency.

One of the objects of the present bill, to which the executors and all the other legatees are parties, is to recover the amount of said notes, being about the sum of \$1000. This relief was refused by the Chancellor.

We think the decree is erroneous in every aspect of the case. Upon the plainest principles of equity, the other legatees, who, by reason of the widow's acceptance of these worthless notes, have received more than their just proportion of the fund, are bound to refund to her.

Admitting, as the decree of the Chancellor assumes, that

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there was no *fraud* in the transaction ; still, the widow's claim to relief is clear, on the ground of mutual *mistake*. The proof places it beyond all question, that the notes were received by the complainant on the faith of Wisener's assurance that they were perfectly good ; and there is as little doubt that the latter honestly believed the fact to be so. And by this representation, the other legatees are bound, for the reason that they were present and assented tacitly, at least, to its truth ; and likewise, on the distinct ground, that, as a consequence of this prejudice to the rights of the complainant, the other legatees derived a direct benefit to themselves.

If the allegation of the executor, Brown, in his answer, were established by the proof, that each legatee, by the terms of the arrangement, was to take the notes allotted to him at his own risk, it would not affect the determination. Admitting that complainant accepted the notes in question under such an agreement, she was induced to do so by the representation of the executor, who stood in the relation of trustee ; and if the representations were untrue, she would not be bound by her assent to the agreement, whether the representations were fraudulently made, or merely the result of an innocent mistake.

Upon this point the decree will be reversed.

The allegations of the cross-bill are not sustained, and the decree dismissing it will be affirmed.

CELIA HOWARD *et al.* v. JOHN HUFFMAN.

1. DEED. *Title cannot be re-vested by surrender of.* By the execution and delivery of a deed, the title passes, and the returning of it to the vendor, whatever may be the intention of the parties, will not re-vest the title in him. A re-conveyance is indispensable.

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2. **SAME.** *Same.* *Estoppel.* If the grantee voluntarily destroy or surrender the deed, with the intention of defeating his own title, he would be estopped from setting it up, or showing its contents by parol evidence.

FROM FRANKLIN.

This cause was heard at the July Term, 1859, before Judge MARCHBANKS.

HICKERSON and ESTELL, for the plaintiff in error.

A. S. COLYAR, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of ejectment. Judgment for the plaintiff.

The Court was requested by defendant's counsel to give the jury the following instruction, namely: "That if the deeds from Howard to Huffman were voluntary, and without consideration, and were, in point of fact delivered to Huffman, and, after such delivery, they were re-delivered by the latter to Howard, and such re-delivery was intended by the parties to re-vest the title in him, the effect thereof would be to divest Huffman of title, and re-vest the same in Howard."

The Court refused, and stated the contrary of this proposition to be the law. This was obviously correct.

By the execution and delivery of the deeds in question, by Howard to Huffman, the former divested himself of the title, and the latter became, thereby, vested with an *inchoate* legal estate, before registration of the deeds.

By the mere act of returning the deeds to the vendor, whatever may have been the intention, no title could re-vest in him; to effect this, a re-conveyance was indispensable.

It is well settled that even the destruction of a deed for land will not operate to re-vest the title in the grantor.

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It is, perhaps, true, that the intentional surrender or cancellation of the deed, made expressly with a view to re-vest the title in the grantor, might have the effect of a re-conveyance; but this would be upon the principle of *estoppel*. The grantee having voluntarily destroyed or surrendered the deed, with the intention of defeating his own title, would be estopped from setting it up, or showing its contents by parol evidence. 4 Kent's Com., 196, note b.

This specific instruction, however, was not asked for; nor would it have been pertinent, upon the proof in the record.

Judgment affirmed. ✓

H. C. HURST v. EDMUND WORD *et al.*

EVIDENCE. *Witness, competency of. Principal and surety. Payment.*

The principal in a joint and several bond, or in a judgment against several, is not a competent witness, in behalf of the surety, to prove payment of the debt or judgment.

FROM BEDFORD.

At the December Term, 1858, verdict and judgment were for the defendants, DAVIDSON, J., presiding. The plaintiff appealed.

E. & H. COOPER, for the plaintiff.

WISENER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

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The principal question in this case is upon the competency of the main witness, Samuel Doak.

In 1853, various judgments were obtained against Samuel Doak and Edmund Word; others against them and one Hays; and others against Doak and Hays, and stayed by Word, for a considerable amount in the aggregate, and all in favor of the plaintiff, Hurst. Doak and Hays having left the country insolvent, and the said judgments remaining unsatisfied, alias executions were issued against all the parties, on the 1st of December, 1857, and levied upon the property of Word. Whereupon he applied for and obtained, by petition to a Circuit Judge, writs of *certiorari* and *supersedeas*. The ground stated in the petition is, that the said judgments had all been paid off by Doak, the principal, before he left the country. Upon the trial of this fact before the jury, the deposition of Doak, who was the principal in all the judgments, as stated in the petition, was offered as evidence. It was objected to by the plaintiff, as inadmissible, on the ground of interest, and that he was a party to the record. The Court overruled the objection, and permitted it to be read, and there was a verdict against the plaintiff upon the proof of payment made by Doak in his deposition. There is no other evidence on that point.

The argument for reversal is, that there was error in the admission of Doak as a witness. That is the only question. He was a joint defendant in the judgment and execution, which he was introduced to prove had been paid off and discharged. He is the party primarily liable. His being insolvent does not change the question. If the money be collected from the petitioner, Doak would be liable over to him, not only for the amount of the debt, but for the additional costs of this proceeding. In 1 Greenleaf's Ev., sec. 395, several cases are put which would seem to be decisive of this question. "In an action on a joint and several bond against the surety, he cannot call the principal obligor to prove payment of the money by the latter in satisfaction of the debt; for the princi-

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pal has an interest in favor of the surety to the extent of the costs." 5 East, 565-7, and 2 Pickering, 304, cited.

We are referred to the case of *Barnes v. Dick*, 9 Yer., 430; as a conclusive authority in favor of the ruling of the Court in this case. In that case, one of the principal defendants in the judgment was permitted to be a witness in favor of his stayor, on the question of his original liability as such, for want of authority on the part of the justice to enter his name. This was quite a different question. It was a matter of entire indifference to the principal whether the stayor was rendered liable or not on that ground. But here the principal is called to prove that his surety should not be bound to pay the judgment, because it has been entirely paid off and discharged, as to all the defendants, himself included.

But it is said that his interest is balanced, because, if the surety succeeds on his proof, he will still be liable himself to the creditor, upon the issuance of an alias execution on the same judgment; and if the surety fails to be exonerated, but has the money to pay, he will be liable to him. But if this were so, yet we have seen that additional costs, at least, would fall upon him on the latter result, and that would disqualify him. 1 Greenleaf's Ev., 395.

But he is also a material party to the record, and even upon that ground it is difficult to see how he can be a witness. 9 Yer., 480-5. If he could prove payment in this case in favor of his surety, then upon another execution against him, the surety, in like manner, by proving the same fact, could relieve him. It would be unsafe to allow such a practice.

But could an alias be issued against Doak at all after the discharge of his co-defendant? In that case how could the execution pursue the judgment?

The judgment will be reversed, and a new trial granted.

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SAMUEL TURNEY v. JAMES C. OFFICER.

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DEPOSITIONS. *May be read although witness in Court.* Code, § 3837. If the deposition of a witness is taken, under section 3837 of the Code, it may be read, although the witness is present in Court. If the opposite party desires a further examination, he may introduce the witness, treating him as the witness of the party taking the deposition.

FROM WHITE.

This cause was tried before Judge FITE. Verdict and judgment for the plaintiff. The defendant appealed.

COLMS, for the plaintiff in error.

J. P. MAURY, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

The first and principal exception to the regularity of the proceedings is in permitting the deposition of C. H. Black to be read as evidence to the jury; the ground of the exception is, that Black was present in Court at the time. It seems that Black was a resident of the county in which the suit was pending, and his deposition was taken some time preceding the trial, on behalf of the plaintiff, Officer; and the defendant, without any objection on his part, cross-examined.

The deposition, we infer, was taken in pursuance of sec. 3837 of the Code, which provides that the deposition of any person residing in the county in which the suit is pending, may be taken by either party; but secures to the opposite party the right to summon the witness, whose deposition may be thus taken, and, in effect, to cross-examine him as the witness of the party taking his deposition.

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This section of the Code introduces a change of the law, as regards taking the depositions of persons residing in the county in which the suit may be pending; formerly, the depositions of witnesses living in the county could not be taken generally, but only in special cases upon cause shown.

Inasmuch, then, as the deposition was regularly taken, was it any ground of objection to its being read, that the witness happened to be present in Court at the time of the trial? Certainly not. The deposition was admissible evidence; and although the party might have been permitted, in the discretion of the Court, to have passed by the deposition, and to examine the witness on the trial, yet he could not be required to do so. If the opposite party desired a fuller examination, this right is secured to him, without prejudice, as he may do so, treating the witness not as his own, but as the witness of the party taking the deposition.

There is nothing in the other ground insisted on to justify us in disturbing the judgment. It is true, some suspicions may be entertained of the good faith of Officer, in taking up the slave; but this matter was left to the jury, under proper instructions, and it cannot be said that there is no evidence to support the verdict. Judgment affirmed.

R. C. BANDY v. B. W. WALKER.

1. **ADATEMENT AND REVIVOR.** *Special administrator.* If a party die intestate, pending a suit, the County Court has no power to appoint a special administrator for the purpose of prosecuting or defending that particular suit.
2. **SAME.** *Revivor against heirs.* Act of 1809, ch. 121, § 3. Code, § 2819. In such a case, if no person will administer, the other party may revive, by *scire facias*, against the heirs of the deceased, for

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whom, if minors, the Court will appoint a guardian, which being done, the suit may be prosecuted, as in other cases.

FROM FRANKLIN.

The Court, MARCHBANKS, J., presiding, refused to revive the suit in the name of the special administrator, and the plaintiff appealed.

A. S. COLYAR, for Bandy.

HICKERSON, ESTILL and TURNEY, for Walker.

McKINNEY, J., delivered the opinion of the Court.

During the pendency of this suit, namely: at the March Term, 1858, the death of the defendant, Walker, was suggested.

The County Court of Franklin, on the application of the plaintiff, appointed William G. Brooks "special administrator" of the estate of the deceased, "for the purpose of defending" this particular suit. Brooks was brought in, by *scire facias*, to show cause why the suit should not be revived against him. The revivor being objected to, was refused by the Court; and the case is brought here upon this question.

We are aware of no authority for the appointment of an administrator in such a case. The exact case is provided for by the act of 1809, ch. 121, sec. 3. By this statute, it is enacted, in substance, that when a suit may be pending against a person who shall die intestate, and no one will administer on his estate, the plaintiff, by *scire facias*, may revive against his *heirs*, for whom, if minors, the Court shall appoint a guardian to defend the suit, and this being done, "the plaintiff may prosecute his suit to judgment and execution, as in other cases."

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The provision of the Code, (sec. 2849,) is still broader; it authorizes a revivor, in such cases, by or against the heirs of either plaintiff or defendant, who may die pending the suit.

There is no error in the judgment.

JOHN S. BRAZELTON v. NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

SET-OFF. *Act of 1852, ch. 259, § 2. Judgment for excess.* The right to a set-off is incidental to, and dependent upon the fact of the plaintiff's having established a right of recovery against the defendant. If this fails, the right of set-off cannot exist; and judgment cannot be rendered under the act of 1852, for any excess that may be found in favor of the defendant.

FROM WARREN.

Judge MARCHBANKS refused, upon the motion of the defendant, to render judgment in his favor for the excess, and he appealed.

PETER TURNEY and SCURLOCK, for the plaintiff in error.

COLYAR and ESTILL, for the defendant in error.

MCKINNEY, J., delivered the opinion of the Court.

This was an action of assumpsit brought by the defendant in error against Brazelton, in the Circuit Court of Franklin, on the 16th of November, 1852, to recover the amount of his subscription for stock in the road; and also for money had and received to the use of the plaintiff.

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The defendant pleaded non-assumpsit, payment, and set-off.

It appears that Brazelton was employed by the company as a contractor, in the construction of the road, and that he performed a large amount of work in grading the track of the road. While thus employed, he received various sums of money belonging to the company, amounting to a large sum; and, as alleged, exceeding considerably the amount due to him for his work upon the road, according to the contract prices. To recover which excess the present action was brought.

The defendant, not producing, or relying upon, the contract under which the work was performed, examined various witnesses to show the amount and kinds of labor done by him, and their estimates of the reasonable value thereof. This evidence seems to have been offered upon the assumption that the contract under which the work was done had been obtained by fraud on the part of the agent of the company. It does not seem to have been controverted, that according to the contract prices, and the estimates of the engineer of the road, the defendant's claim for his work and labor had been satisfied, leaving him indebted to the company.

The value of the defendant's work, according to the vague and general estimates of his witnesses, very largely exceeded the amount to which he was entitled by the terms of the contract.

The jury found against the plaintiff on the pleas of non-assumpsit and payment; and on the plea of set-off, they found that the plaintiff was indebted to the defendant in the sum of \$4596.60.

On this finding, the defendant, by his counsel, moved the Court to render judgment against the plaintiff, in favor of defendant. The Court refused the motion. And upon this ground an appeal in error was prosecuted to this Court.

The question presented by counsel is, whether, under the act of 1852, ch. 259, the Court possessed the power or jurisdiction to render any judgment in favor of the defendant, on the finding of the jury; for, the case having arisen before the adoption of the Code, its provisions have no application.

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The act of 1852, sec. 2, provides, that "where the set-off plead by the defendant, is found to exceed the claim of the plaintiff, in any of the Circuit Courts of this State, that the Court shall give judgment in favor of the defendant, for the excess of the said set-off over the claim of the plaintiff."

A set-off was unknown to the common law; and the principle of set-off as introduced by statute, was restricted in its operation to the abatement or extinguishment of the plaintiff's demand, as the case might be; it had no greater scope. Prior to the act of 1852, in original cases in the courts of record, if the defendant's set-off exceeded the plaintiff's demand, he was turned round to an action to recover the excess. This was sometimes attended with serious inconvenience, especially where the set-off consisted of matter of account composed of numerous items, from the difficulty of establishing what particular portions of the account were embraced in the set-off. To remedy this difficulty, and others that may be imagined, and likewise to prevent circuity of action, the act of 1852 was passed.

But there is nothing in the act from which it can fairly be deduced that it was the intention of the Legislature to change the essential principle of set-off, further than merely to invest the courts with power to render judgment for the defendant, in case his claim exceeded the plaintiff's, and a verdict were found in his favor for such excess. This is the extent of the power. The idea of a set off, in a case where the plaintiff has altogether failed to establish any demand whatever against the defendant, is not to be found in the act of 1852. The right to a set-off is incidental to, and dependent upon the fact of the plaintiff's having established a right of recovery against the defendant; and if this fails, the right of set-off cannot exist.

Such was the construction given to the act of 1815, ch. 53, in the case of *Edington v. Pickle*, 1 Sneed, 122; and the principle is the same in both cases.

If it were necessary to the determination of the case, it might well admit of doubt whether the evidence in support of

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the set-off was at all admissible, inasmuch as the defendant's claim, as it would seem from this record, arose out of the alleged *fraud* of the plaintiff; and, therefore, under any statute prior to the act of 1856, was not the proper subject of a set-off. But a decision of this point is not called for.

Judgment affirmed.

G. W. BUFFORD v. JOHN HINSON.

1. **ROADS.** *Change and acceptance by overseer and hands.* Code, § 1228. If a public road is changed, and the new road is accepted by the overseer and a majority of the hands, so as to bring the case within section 1238 of the Code, the penalty imposed in the previous section is remitted.
2. **SAME.** *Limitation as to recovery of penalty.* Code, § 1237. For the penalty given for the obstruction of a public road, by section 1237 of the Code, there is a fresh cause of action accruing at the end of each month, from the time of the obstruction, and the statute forms no bar as to the monthly penalties accruing within twelve months.
3. **SAME.** *Change and acceptance only remits the penalty.* The change and acceptance of a public highway, as prescribed by the Code, does not legalize the obstruction, but only remits the penalty, leaving the party liable, as before, for a nuisance.

FROM STEWART.

At the July Term, 1859, PEPPER, J., presiding, there were verdict and judgment for the defendant. The plaintiff appealed.

J. E. RICE, for the plaintiff.

KIMBLE, for the defendant.

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WRIGHT, J., delivered the opinion of the Court.

The change of the public road in this case, by the defendant, is conclusively shown, by the proof, to have been for the general good, and that the new road was put upon ground compatible with the interest of the traveling community; and there is proof tending to show that it had been accepted by the overseer and a majority of the hands of the old road, so as to bring the case within section 1238 of the Code. If so, the penalty imposed in the previous section was remitted; not only in the future, but as to the past. If, therefore, the Circuit Judge had confined his instructions to this aspect of the case, we think the acquittal of the defendant would have been proper. But this he did not do, but instructed the jury that if the obstruction was put across the road stopped up by the fence of the defendant, more than twelve months before the bringing of the suit, the action would be barred, and the plaintiff could not recover. This, we think, is erroneous. Section 1237 of the Code provides that no person shall turn, alter, or change a public road, unless by order of the County Court, founded on the report of a jury, appointed and sworn, under the penalty of five dollars for each month such road remains turned out of its old course; to be recovered on summons before any magistrate, at the suit of any person who will sue for the same.

Now, it is obvious, from the language of this section, that there was a *fresh cause of action* accruing at the end of each month, from the time the road was turned, so long as the obstruction was permitted to remain, unless the new road were accepted by the overseer and a majority of the hands having charge of the old road, as required in the subsequent section. It follows, that for so many of the monthly penalties as had accrued within twelve months before the institution of the suit, the statute had formed no bar; but as to those without, it had.

It is to be remembered that the change of a highway and its acceptance, in the mode required in section 1238 of the

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Code, does not legalize the obstruction of the old road, but only remits the penalty; leaving the party liable, as before, for the nuisance—the alteration never having been sanctioned by the County Court. This was held in *Blackmore v. Penn*, 4 Sneed, 447.

For the error aforesaid in the charge, we reverse the judgment of the Circuit Court, and remand the cause for a new trial.

HILLMAN, BROTHERS v. WILEY HICKERSON, EX'R., &C.

1. *SCIRE FACIAS. Administrators and Executors. Code, §§ 2271, 2272. Practice.* On the return of a justice's execution against an executor or administrator, "no property found," the justice, on suggestion and application of the plaintiff, his agent or attorney, shall return the papers to the next Circuit Court of his county. And upon said papers *scire facias* shall be issued, and all other proceedings be had for the satisfaction of such judgment, either out of the goods and chattels, lands and tenements, of the defendant, in case he has wasted the assets, or out of the real estate of the deceased.
2. *SAME. Same. Devastavit. Debt. Practice.* When an executor or administrator has been guilty of a *devastavit*, he may be rendered personally liable, either by an action of debt on the judgment, alleging a mismanagement or wasting of the assets, in the declaration, or by *scire facias*, suggesting a *devastavit* of record and obtaining an order for the issuance of the writ.
3. *SAME. Satisfaction out of the real estate. Heirs. Practice.* If it is desired to obtain satisfaction out of the real estate descended to the heirs, a suggestion must be made upon the record of the fact that real estate has descended to the heirs, as a necessary foundation for a *scire facias* against them. The clerk has no power to issue the writ in vacation.

FROM COFFEE.

The demurrer to the *scire facias* was sustained by Judge MARCHBANKS, and the plaintiffs appealed.

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DAVIDSON, for the plaintiffs.

HICKERSON, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was a *scire facias* against the defendant, as executor of Leander Hickerson, to show cause why the plaintiffs should not have execution *de bonis propriis*. There was a demurrer to the *scire facias*, which was sustained.

The plaintiffs recovered judgment against the defendant as executor, before a justice, on the 11th of January, 1859, for \$286.83. Execution issued thereon, and was returned no property of the testator's estate in the hands of the defendant to be found. And, thereupon, the execution and papers in the case were returned by the justice into the office of the Circuit Court; and the clerk, *in vacation*, issued a writ of *scire facias* thereon, commanding the defendant to appear at the next term of the Circuit Court, to show cause "why execution should not issue against his own proper goods and chattels," &c.

This proceeding was instituted under the Code, secs. 2271, 2272, which are simply a re-enactment of the act of 1822, ch. 43, sec. 1.

The mode of proceeding prescribed is, that, on the return of the justice's execution against an executor or administrator, "no property found," the justice, "on suggestion and application of the plaintiff, his agent or attorney, shall return the papers to the next Circuit Court of his county." And "upon said papers, *scire facias* shall be issued, and all other proceedings be had for the satisfaction of such judgment, either out of the goods and chattels, lands and tenements of the defendant, in case he has wasted the assets; or, out of the real estate of the deceased."

These provisions of the Code, place a justice's judgment on the same footing with the judgment of the Circuit Court, as respects the modes of proceeding to obtain satisfaction.

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When an executor or administrator has been guilty of a *devastavit*, there are two modes of proceeding to render him personally liable to the satisfaction of the judgment obtained against him in his representative character; the one by an action of debt on the judgment, and the other by *scire facias* founded thereon. These remedies are concurrent. The foundation of each is a *devastavit* committed by the personal representative; and without the suggestion of a *devastavit*, neither remedy can be maintained. If an action of *debt* be resorted to, the declaration must distinctly allege a mismanagement or wasting of the assets by the defendant. But if the more summary remedy by *scire facias* be adopted, a suggestion of the *devastavit* must first be made of record, as the ground for issuing the writ; for a *scire facias* must be based upon some matter of record. So if the plea of fully administered shall have been found for the personal representative, and it is desired to obtain satisfaction out of real estate descended to the heirs, a suggestion must be made upon the record, of the fact that real estate has descended to the heirs, as a necessary foundation for a *scire facias* against them.

From these principles it is clear that the proceeding in this case is irregular and void. The clerk had no power or authority to issue the writ. Its issuance is a judicial act, based upon a suggestion made of record, and it must be awarded by the Court.

The demurrer to the *scire facias* was, therefore, properly sustained.

Judgment affirmed.

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ALLEY et al. v. JAMES T. CONNELL et al.

1. **FRAUDULENT CONVEYANCES.** *Fraud in law, and fraud in fact. Effect of.* A conveyance fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under *suspicious* circumstances, or which is only constructively fraudulent.
2. **SAME.** *Same. Repayment of purchase money. Lien.* If the deed be void for fraud in fact, the creditor is entitled to avoid it without repayment to the fraudulent purchaser, of the purchase money. But where it is only fraudulent by construction of law, the purchaser will be protected to the extent of refunding his purchase money, or allowing the conveyance to stand as a security for it.
3. **SAME.** *Suspicion. Onus of proof.* If the consideration of a deed is impeached by the bill, and the circumstances, though insufficient to establish that it is actually unfounded, are sufficient to cast strong suspicion upon it, it is incumbent on the purchaser to establish the consideration by satisfactory proof.
4. **SAME.** *Same. Same. Payment. Presumption.* If the fact is proved that the consideration was paid, the presumption of law, in the absence of contradictory proof, is, that the money belonged to the purchaser.
5. **SAME.** *Consideration paid. Appropriation of same.* When the consideration of a conveyance is paid the purchaser is not chargeable with the duty of seeing to its appropriation. If therefore, the money paid be misapplied, it does not invalidate the conveyance.
6. **SAME.** *Deed. Inadequacy of consideration. Chancery.* A deed, with a small consideration, connected with other inequitable circumstances, will be set aside in equity, in favor of a creditor, so far as to let in his debt; and a sale of the land will be decreed, unless the conveyee will advance the difference in amount between the sum paid and the fair value of the land, to be ascertained in some satisfactory mode.

FROM ROBERTSON.

The bills were dismissed by the Chancellor, and the complainants appealed.

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HOUSE, SHACKLEFORD, LOWE, and BENTON, for the complainants.

ROBB & BAILEY, GARNER, and MULLOY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainants are creditors of James T. Connell. They seek, by the several bills consolidated in this record, to set aside certain conveyances, alleged to be fraudulent, made by said Connell, and to be let in to have satisfaction of their respective debts out of the property thus conveyed.

The several bills were dismissed by the Chancellor.

It appears that on the 12th day of June, 1856, James T. Connell, being in a very embarrassed and failing condition, made an assignment for the benefit of certain of his creditors, of thirteen slaves, and other personal property. At the same time, he made an absolute sale and conveyance of five slaves to his brother-in-law, William G. Logan, who was not then of full age, for the consideration of \$2000.00. And on the same occasion, he made an absolute sale and conveyance, to his mother, of his remainder interest in a tract of land of 198 acres (in which his mother had a dower estate) at the price of \$7.50 per acre, and likewise of his individual moiety of another tract of land, of 383 acres, at the price of \$15.00 per acre.

These several conveyances are impeached for fraud, and are sought to be avoided.

As regards the assignment for the benefit of creditors, and the conveyance of the five slaves to Logan, we need only remark that, upon a view of all the facts, we are of opinion that the complainants are not entitled to any relief; and thus far the decree of the Chancellor will be affirmed.

It remains to be considered whether the complainants are entitled to any relief as respects the conveyance to Mrs. Connell of the real estate.

The proof shows that at the time of the conveyance, or

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immediately preceding its execution, and as part of the same entire transaction, a settlement of accounts was made between James T. Connell and his mother, according to which there was due from the former to the latter the sum of \$1575.00. The aggregate price of the land, as estimated by the parties, was \$3615.60. This was liquidated as follows: A credit was allowed for the sum of \$1575.00, assumed to be due to Mrs. Connell from her son: a cash payment was made at the time, of \$1413.85, leaving a balance of the consideration money of \$626.15, for which Mrs. Connell executed a note, due one day after date, payable to her son, and which the proof shows she afterwards paid.

It is alleged that this demand of Mrs. Connell against her son was unfounded and fabricated for the occasion. The answer of Mrs. Connell asserts, in strong terms, that it was a just debt, and the case as to this matter stands upon the bill and answer; there is no proof upon the subject either way.

A copy of the statement of the account, made out at the time of the execution of the conveyance, is exhibited by Mrs. Connell with her answer. It is made up of various items, for money loaned at different times, hire of slaves, horses, mules, and grain, all of which are without date.

This account, upon its face, is suspicious, and the time and circumstances of its settlement tend to strengthen suspicion of its fairness. We by no means assume that the claim is positively fraudulent or unfounded. This is not necessary to be assumed, in the view we have taken of the case. The justice of the claim being impeached by the bill, and the circumstances—though insufficient to establish that it is actually unfounded—yet, being at least sufficient to cast strong suspicion over it, it was incumbent upon Mrs. Connell to establish its justice by satisfactory proof. 6 Humph., 158. And from the character of the account, it would seem that the items, if just, were susceptible of proof, without any requirement either impossible or unreasonable in itself, to some extent at least.

So far, then, as this part of the consideration is concerned,

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we think there is an entire failure of proof to support the conveyance.

It is further alleged in the bill that the money passed from Mrs. Connell to her son, as part of the consideration of the conveyance, was not her money; that it was either the money of her son placed in her hands previously for the purpose of giving color to the transaction, or money borrowed for that purpose, and restored again to the proper owner after the occasion had passed. The answer contains a very emphatic denial of this charge, and a positive asseveration of the fact that the money was her own. The proof makes it more than probable that the money could not have been furnished by the son, and there is no just foundation for the assumption that it was borrowed from any one; and, although Mrs. Connell fails to account satisfactorily for the possession of so large an amount of money, and notwithstanding the proof of the complainants leaves this point involved in something of obscurity and mystery, yet the fact is fully proved that she did pay the money, and the presumption of law, in the absence of countervailing proof, is that it was her own; and in view of all the evidence, we do not feel warranted in saying that this presumption is repelled. Giving to the opposing proof of the complainants all the force to which it is properly entitled, we are still constrained to admit that the money may have actually belonged to her. Such is our conclusion as to the sum of \$1413.85, paid down, as well as to the sum of \$626.15 paid afterwards.

What appropriation James T. Connell may have made of this money, is an irrelevant inquiry, in the present case, as Mrs. Connell was not, in law, chargeable with the duty of seeing to its appropriation.

It is further alleged that the prices at which the lands were sold to Mrs. Connell, were scarcely half the fair value. The weight of the proof establishes, as it seems to us, that the sale was at an under value so considerable as, upon that ground, in connection with the fact as to the credit of \$1575.00 allowed Mrs. Connell, and other suspicious circumstances at-

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tending the transaction, to demand the interposition of a court of equity. The principle upon which a court of equity interferes in such a case, is illustrated by the case of *Boyd v. Dunlap*, 1 John, ch. R. 479, and the doctrine is well sustained both on principle and authority.

A just discrimination is made between actual, intentional fraud and constructive fraud, or fraud in law. A conveyance fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious circumstances, or which is only constructively fraudulent. *Ibid.* 482.

If the deed be void for fraud in fact, the creditor is entitled to avoid it without repayment, to the fraudulent purchaser, of the purchase money. But where it is only fraudulent by construction of law, the purchaser will be protected to the extent of refunding his purchase money, or allowing the conveyance to stand as a security for it. In the language of Chancellor Kent, in the case referred to, "Nothing can be more equitable than this mode of dealing with these conveyances of such indecisive and dubious aspect, that they cannot either be entirely suppressed or entirely supported with satisfaction and safety." This principle has been applied to the case of a purchaser at a great undervalue, connected with other inequitable or suspicious circumstances. *Ibid.* 482, and cases there cited. So a deed, with a small consideration, was set aside in equity, in favor of a creditor, so far as to let in his debt. Lord Hardwick held that the creditor was entitled to this relief, whether he could or could not have set aside the deed at law. 2 Ves., 51; *Id.* 516; 1 Vern., 465.

This doctrine we think applies to the present case.

The inadequacy of the consideration—taking into view the under value at which the lands were estimated, and the absence of proof of Mrs Connell's account which was admitted in part discharge of the purchase money, and other circumstances of a suspicious nature surrounding the transaction—forbids that the transaction should be permitted to stand as

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an absolute conveyance of the lands. But yet, inasmuch as the proof, when all the circumstances are properly considered, fails to establish actual fraud, and the motives which probably led to the sale and purchase of the lands being compatible with the absence of any positive intention or purpose, on the part of either, to defraud the creditors of James T. Connell, and the fact being sufficiently established that Mrs. Connell really did advance a large sum of money upon the faith of the conveyance, we think it clear that the deed should be permitted to stand as a security for the purpose of reimbursement and indemnity to her, to the extent of the money really advanced by her, and likewise to the extent of her account against James T. Connell so far as she may be able to establish, by satisfactory proof, that the same was an existing, *bona fide* debt due to her from her son, at the time of the conveyance.

The cause will be remanded, to afford Mrs. Connell opportunity to establish her account; upon this being done, a sale of the lands will be decreed, unless Mrs. Connell will advance the difference in amount between the sum which shall be found to have been paid by her and the fair value of the land, provided such value may be ascertained in any satisfactory mode, otherwise than by a sale.

The decree will be reversed thus far.

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1. COUNTY COURT. *Power of Quorum Court.* A County Court composed of three or more Justices, has power to transact all the *ordinary business* of the county, among which is classed the collection of debts and claims due it.
2. SAME. *Same. Attorneys. Rule upon for authority to sue.* In matters pertaining to the *ordinary business* of the county, suits may be authorized by an order of the County Court, composed of three Justices;

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and such order will be sufficient in discharge of a rule upon the attorney of the county to show his authority.

3. **SAME. Commissioners. Act of 1835, ch. 29, § 8.** The act of 1835, ch. 29, sec. 8, authorizing the appointment of commissioners to receive propositions for the building of a public bridge does not contemplate that they shall receive or complete the contract for its construction; but, only that they shall report their proceedings to the County Court for its acceptance or rejection.
4. **WITNESS. When interest disqualifies. Evidence.** If a witness has no more private or personal interest in the subject matter of the suit, than any other inhabitant or citizen of the county, he is competent. In such case his interest is too remote, contingent and minute to disqualify him.
5. **SAME. Party to the record. Justices of the county. Corporation.** A suit by the Justices of the County Court is, in legal effect, a suit by the county, which is a public corporation; and it is this corporation that is the party to the record. The Justices have no private interest in the suit, and their names may be rejected as surplusage; and any one of the Justices is, in such case, a competent witness.
6. **EVIDENCE. Parol to prove or supply a record of another Court.** In a suit pending in one Court oral evidence is inadmissible to supply a defect in the record of another Court, by showing that an order was made or proceeding had in that Court, which the clerk by mistake or through negligence or from other cause, omitted to enter on the record.
7. **SAME. Same. Witness. Competency.** If the right of recovery by the plaintiff depended upon the record of another Court, it would be incompetent to establish such record by oral testimony; but if not, and the defendant relies upon his release by the action of the Court, it is no ground of reversal, that a witness was permitted to prove that no such release was made; because this could be shown only by the record and the evidence did him no hurt.
8. **SAME. Testimony of deceased witness. Record.** If it is sought to reverse the ruling of the Court below, because of the rejection of proof of what a deceased witness swore on a former trial, it is necessary that it be stated in the record what the testimony of the deceased witness was, so as to enable the Supreme Court to see that it was material in the case.
9. **SAME. Principal and agent. When statements of agent competent. Res gestæ.** If the statements of an agent is a narrative of his understanding of a past occurrence, after the transaction has been executed, and constitute no part of the *res gestæ*, they are inadmissible against his principal.

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10. *BOND. Acceptance of. Presumption.* A bond containing stipulations beneficial to the obligee, though delivered to a stranger to his use, is, until he reject the same, presumed to be accepted by him; but the presumption is otherwise, if the stipulations may work an injury to him
11. *Statute of limitations. Contract. Breach, rescision or abandonment of.* If no cause of action either for a breach of a contract, or for the money paid under it, upon its rescision or abandonment exist until within three years before the bringing of suit, the statute of limitations will not bar a recovery.

FROM GILES.

This cause was tried in the Circuit Court of Giles, at the December Term, 1857, Hon. W. P. MARTIN, presiding. Verdict and judgment for the plaintiff. The defendant appealed.

JONES and WARD, for the plaintiff in error.

WALKER, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

The plaintiff in error undertook to build a public bridge in Giles county, but failed to do so, and for this breach of his contract the present action was brought and resulted, in the circuit court, in a verdict and judgment against him and he has appealed to this Court.

A reversal of the judgment is claimed upon several grounds which we shall proceed to consider.

The first error complained of is, that the Circuit Judge refused to dismiss the suit and discharged the rule obtained upon the attorneys of the plaintiff below, for its dismissal, for want of authority to prosecute the same.

In this he did not err. The suit was authorized by an order of the county court of the county—composed of twenty-four Justices who were present—nineteen of whom voted in favor of it and five against it. These twenty-four constituted a majority of all the Justices of the county, but the nineteen did not. But this was immaterial, since it is clear that a

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court composed of *three*, or more Justices, has ample authority to transact all the *ordinary business* of the county coming before it, among which must be classed the collection of debts and claims due it. To assess a tax, appropriate public money and the like, require, by the *express* provisions of the law, the presence of a greater number of Justices. But that is not this case. *Louisville & Nashville R. R. Co. v. The County Court of Davidson County, et al.*, 1 Sneed, 680—682. It is next insisted the circuit court erred in permitting Edward W. Rose to be examined as a witness for the plaintiff, because he was a party to the record and interested in the event of the suit, and therefore incompetent. This position is untenable. He had no *private* or *personal* interest in this fund any more than any other inhabitant or citizen of the county; and in such a case it is settled in this State, whatever may have been held elsewhere, that the witness is competent—his interest being too remote and contingent, as well as too minute, to disqualify him. *Mayor and Aldermen of Jonesboro' v. McKee*, 2 Ycr., 167; *Gass' heirs v. Gass' executors*, 3 Hum., 278, 285, 290; *Corwin v. Hawes*, 11 Johns., 76; *Bloodgood v. The Overseers of the Poor of Jamaica*, 12 do, 285. And as to the other ground, he was no *party* in the sense to exclude him as a witness. To be sure he was a Justice of the Peace of Giles county and the suit is in the name of himself and of the other Justices, who sue in that capacity, on their own behalf, as well as on behalf of the citizens of said county. But in legal effect, the suit is by the county of Giles, which is a public corporation, and it is this corporation and not the Justices of the Peace or citizens of the county, that is the *party* to the record. They have no *private* interest in the suit, and their names may be rejected as surplusage. If they were all to die it would not abate, and their personal representatives could claim no share in it. 1 Hayw. R., (Anonymous) 144, *Polk, Governor, v. Plummer et al.*, 2 Hum., 500; *Maury County v. Lewis County*, 1 Swan, 236, 239, 240; 1 Greenl. Ev., sec. 332. Nor do we think the circuit court committed any error for which the

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judgment should be reversed, if it be error at all, in permitting this witness to prove that after the plaintiff became the contractor to build this bridge, he applied, time and again, to the county court to have Ivey substituted in his stead, which the court always refused to do, and never did, so far as he knew, receive or recognize him as a contractor. This application and refusal were not placed on record in the county court and did not otherwise appear than in the testimony of the witness. It is true that in a suit pending in one court, oral evidence is inadmissible to supply a defect in the record of another court, by showing that an order was made or proceeding had in that court, which the clerk, by mistake, or through negligence, or from other cause omitted to enter on the record. The action of the county court, *as such*, could alone be shown by its records. 2 Hum., 390; 3 Dev.; 423, 4 Ird., 140. And if the right of the county to recover depended upon such a record, which in fact does not exist, the objection would be fatal. But it does not. Its right is complete, and rests entirely upon the undertaking of Ezell, the plaintiff in error, who seeks to escape liability by showing his *own release*, and the *acceptance of Ivey in his stead*. If this could only be done by a record from the county court to that effect, then the testimony did him no hurt, as it is not pretended that any such record exists. If, on the other hand, it could be shown by proof *in pais*, or be implied from circumstances, as seems to be supposed by his counsel, in argument, then the evidence was admissible as going to show that no such release, or substitution, ever took place. Angell & Ames on Corporations, (edition of 1832) 163-4. So that whichever way we take it, no reversal can grow out of it.

The next assignment of error arises from the rejection of the evidence of Samuel T. Anderson, who was offered as a witness for the defendant below. He had been present in the circuit court upon the trial of the suit in the name of the State of Tennessee, for the use of Giles county v. Ivey and Herbert, and had heard Edward D. Jones and Amosa Ezell, both of whom had since died, testify in *that* suit; and it was

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proposed to prove by him in *this* suit the substance of their testimony, which the circuit court refused to allow. For this action of the circuit Judge, as the question is presented to us in this record, we cannot reverse ; because if there were no other difficulties in the way (and we think there are others) it is enough that it is not stated, or shown *what their testimony was*, so as to enable this Court to see that it was material in the case, and without which the circuit Judge cannot be put in error. We cannot look to the answer of Edward D. Jones to the bill in chancery of Willis Hammonds to discover the *materiality* of his evidence, since there is no intimation in this record that that answer contains any thing stated by him in his testimony when examined as a witness. It *may* or *may not* have done so. We cannot affirm the existence of error in a judgment upon conjecture, or suppose that the circuit Judge rejected material and competent proof. For aught that appears, Anderson's evidence was wholly immaterial and of no value in the case, and upon well settled law, we are bound so to presume.

It is also very plain that the circuit Judge did not err in refusing to allow the answer in chancery of Edward D. Jones to go to the jury as evidence. Even if he had been the *agent* of the county, or of the county court, to *accept* the bond from Ivey and *release Ezell*, still the answer was *but a narrative of his understanding of a past occurrence*, after the transaction, whatever it was, had been executed, and therefore constituted no part of the *res gestæ*, and upon well settled rules, was inadmissible against his principal. And if it had been shown that the bond of Ivey had been entrusted to him, either as *clerk* or *agent*, by the *county court* for *safe keeping*, and we were relieved of the difficulty of its being a mere narrative of a *past transaction*, still his answer, or statement could not be received as proof of the *acceptance*, by the county court, of the bond from Ivey, nor of any other agreement between the plaintiff and defendant respecting the subject ; because the *res gestæ* consisted in the fact of the custody of the bond, and its nature, and on these points only

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could his statements or declarations be identified with those of his principal. 1 Greenl. Ev., sections 110, 111, 113, 114, 332. *Farlie v. Hastings*, 10 Ves., 124. But he was not the agent of the county court for any purpose whatever. He was only its clerk, and acted simply in the discharge of what he supposed to be his *official duty*, and he so states in his answer. He had no authority to accept the bond of Ivey, or to release Ezell; nor could he, in any way, make agreements or contracts binding upon the county. *State v. Shirley*, 1 Ird., 603. Nor have we been able, after a careful examination of this record, to arrive at the conclusion that the verdict of the jury is unsupported by the evidence; or that the charge of his Honor, the circuit Judge, contains any error available to Ezell. On the contrary, we are satisfied that he became the contractor to build this bridge, and that Ivey was but a sub-contractor for him, and that the county court never did accept the bond of the latter, or release the former, and that he did not, himself, so regard it. The taking of the bond of Ivey and the subsequent suit upon it against him and Herbert, must be treated as the acts of Ezell for his *own security*, and not as things in any way affecting the county. The act of 1835, ch. 29, sec. 3. authorizing the appointment of commissioners to receive *propositions* for the building of a public bridge, does not contemplate that *they* shall receive or complete the contract for its construction; but only that they shall report their proceedings to the county court, and that the *Court* may receive and accept of such proposition, as to it shall seem best; and shall close the contract for the bridge, and have the work executed. But if this were not so, and it shall be regarded that the commissioners took the bond of Ivey and intended thereby to discharge Ezell, yet it is clear here that at the time of doing so they were *functus officio* and had no authority over the subject, and that the circuit Judge did right in so instructing the jury. Besides, as a matter of fact, it may very well be questioned whether the commissioners intended to release Ezell and substitute Ivey. We have seen that the record does not warrant the

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conclusion that he, himself, so regarded it. And one of the most intelligent witnesses in his behalf—himself a commissioner—says his release was not even hinted at, though some of the commissioners supposed the bond of Ivey did have that effect. But the burthen of proof as to this substitution and release was upon the plaintiff in error, and they could not be established without clear evidence of an intention to that effect, which does not exist here. If the bond were merely intended for his protection, or as *an additional security* for the construction of the bridge, it could have no such consequence, even if the authority of the commissioners to take it were conceded. *Day et al. v. Seal and Seal*, 14 Johns. R., 404. The suit upon this bond did not originate with the county court, and the jury were warranted in their verdict, that it had never been sanctioned by the proper authorities of the county. It was instituted by the plaintiff in error with the consent of the commissioners, but they had no authority over the subject. And the mere fact of finding the bond on file in the clerk's office, without more, and especially in the face of the proof in this case, could avail the plaintiff in error nothing. And the circuit Judge did not err in so instructing the jury. It was no doubt placed there by the clerk under the mistaken belief that it was an office bond; and the jury were certainly warranted in finding that it had never been accepted, but was in fact rejected by the county court. It is a rule that a bond containing, instead of burthens, stipulations beneficial to the obligee, though delivered to a stranger to his use, shall, until he reject the same, be presumed to be accepted by him. But here it is claimed that the county court *had released Ezell, had given up the rights of the county upon him, and had accepted Ivey in his stead. This, in place of a benefit, might work an injury to the county.* The simple possession of the bond of Ivey, therefore, by the clerk, without some sanction of it by the county court, ought not in this case, we think, to have been held evidence of its acceptance and the release of Ezell. 1 Ird., 603, 604, 605; 4 do., 149; 2 Hum., 490.

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It may be conceded that it was the duty of the county court to have taken bond and security of Ezell for the construction of the bridge, to have deferred the payments until it was completed, and the fidelity of the execution of the contract had been attested by a committee, and that without these—and certainly until the 1st day of December, 1852, when, by the terms of the contract, the first instalment became due—neither Ezell nor Ivey could have coerced from the county the payment of anything on account of this bridge. Yet these, with other kindred questions in the record, in no way concern the plaintiff in error, and it is not for him to make them. The breach, or neglect of these duties, though it may render the Justices responsible in case of consequential damage, for violation of duty, is a matter wholly between them and the county. If the plaintiff in error, or his sub-contractor, by fair promises to the Court, or its clerk, succeeded in obtaining premature payments upon this contract and then failed to perform it, or abandoned it, how shall this be an answer to an action by the county to recover back the money, thus wrongfully withheld? we are unable to see. There is no reason for supposing that the payments to Ivey were *officious*, or without the authority of the plaintiff in error; and we see no cause to question the correctness of the circuit Judge's charge upon this branch of the case. Ivey had received an assignment from the plaintiff in error of a portion of the money to become due from the county, without any restriction as to the time when he *might* receive payment, and it was left to the jury to determine whether the payments made him were with the assent of the plaintiff in error; and we think they were well warranted in the proof, in finding in the affirmative. There is not the slightest evidence that he interposed to prevent these payments.

The jury have found that the county never accepted this bridge, or waived any cause of action it had in regard thereto, and that the same is of no value to the county. In this verdict the proof sustains them, and it is not pretended that, as to

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these questions, any error exists in the charge of the Court. Neither is there any ground for the application of the statute of limitations. The suit was instituted on the 18th of February, 1856. The plaintiff in error had until the 5th of January, 1854, to complete the bridge, and neither he or Ivey abandoned the work until the *spring of* 1853. No cause of action, either for a breach of the contract, or for the money paid under it, upon the supposition of its rescision or abandonment, existed until within three years before the suit. *Hurst v. Means*, 2 Swan, 594, 598 ; 2 Sneed, 546, 549.

The judgment of the circuit court will be affirmed.

LARKIN KEELING v. HEARD & HICKERSON.

1. LAND LAW. *Execution. Void and voidable.* If land is sold under an execution either void or voidable, and the plaintiff in the execution become the purchaser, he acquires no title by virtue of his said purchase.
2. SAME. *Same. Payment.* Payment extinguishes a judgment and execution as between the parties; and if land is sold by virtue of an execution thus extinguished, and purchased by the plaintiff, he acquires no title to the land.
3. SAME. *Same. Same. Redemption.* If a party redeems land from the purchaser, he is substituted, by the redemption laws, to the rights of the purchaser, and acquires no better title to the land than he possessed. If, therefore, the execution under which land is sold has been paid, and the plaintiff, by himself or agent, become the purchaser, and the land is redeemed by another creditor, neither the purchaser nor the party redeeming acquire any title.
4. CHANCERY JURISDICTION. *Different equities.* When there are several

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equities and rights between the parties to a suit in chancery, the Court has the power and will adjust these various equities and rights by a proper decree in the cause.

FROM COFFEE.

Decree pronounced at the August Term, 1859, RIDLEY, Chancellor, presiding.

HICKERSON, for complainant.

DAVIDSON and ISBELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

W. & L. Hickerson, for the use of David Hickerson, obtained sundry judgments, in 1853, before Justices of the Peace, against Larkin Keeling, and among them one for \$492.36. In April, 1855, an execution issued upon this last judgment, which was levied upon a tract of land of 160 acres, which, after condemnation by the court, was sold, the 3rd of September, 1855, and bid off in the name of W. Hickerson, but for the benefit of David Hickerson, as the proof clearly shows. On the 7th of July, 1857, defendant Heard, being also a judgment creditor of Keeling, redeemed the land by paying into the office of the clerk of the circuit court of Coffee, the amount of Hickerson's debt; and filing a receipt for his own judgment, which was something over \$200. After two years from the sale had elapsed, Heard obtained the Sheriff's deed for the land. Soon after that, this bill was filed by Keeling to set aside the sale and deed, and to be reinstated in his right to the land upon the ground that before the issuance of the execution the said judgment of \$492, and all other judgments against him, in favor of Hickerson, had been fully paid and satisfied; and indeed, overpaid to the extent of several hundred dollars. And upon taking the account, ordered in this case, it so turns out; and a decree is obtained in favor of Keeling against Hicker-

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son for near \$500, from which he does not appeal. The reasons given by the complainant for his delay in asserting his rights in this respect, are sufficient to save his case from any objection on that ground. The strict legal rights of the parties must govern the case.

We regard the fact, that the judgment under which the land was sold was satisfied before the issuance of the execution, as well established. It is clear also that the real plaintiff in the case, David Hickerson, was the purchaser of the land. But we are not prepared to concede that the effect upon the sale, and the rights of the parties under it, would not be the same if the nominal party to the record should be regarded as the purchaser. And even if a stranger to the record had bought it, it is by no means clear that the question would be materially changed in a case where the execution is issued upon a judgment fully paid off. This, however, is not the case before us, and is left undecided.

But it is clear and well settled that even where the process is only erroneous or voidable, a purchase by the plaintiff, or his agent, or attorney would be invalid, (2 Caine's Cases, 61,) though not so with a stranger, without notice in such a case. In the case of *Jackson v. Coldwell*, 1 Cowen, 622, cited and approved in *Waite v. Dolby*, 8 Humph., 410, it is decided that a judgment and execution are extinguished by payment, as between the parties, at least; and that a title derived under them could be defeated in an action of ejectment by proof that the judgment and execution under which the land was sold, had been paid. It was held in *Waite v. Dolby* that the issuance of an execution for money before the issuance and return of distringas, was such an error, or irregularity, as to avoid a sale of land; at least against the plaintiff in the execution. In this case, which is well sustained by authorities cited, page 409, it is distinctly settled, that a purchaser who sues out even voidable or erroneous process, acquires no title by his purchase, though such process would protect the Sheriff, and support the title of a stranger, without notice. So in this case, as the plaintiff in

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the execution was the purchaser, it is immaterial whether the execution be regarded as void, or only voidable.

The only remaining question is, whether the title of Heard by redemption and the Sheriff's deed, is any better than that of the purchaser. There can be no good reason why he should occupy any higher ground. He is simply substituted by the redemption laws to the place of the purchaser, and gets no other or stronger rights. If, for any reason, the title failed to pass to the original purchaser, he can get none, because he barely steps into his shoes, and is clothed with no other rights. He is, by operation of law, the assignee of the purchaser's bid, and can only stand upon his rights and can assert no others. If no title passed to the purchaser, none is vested in the person who redeems.

A court of equity can do full justice to all the parties and adjust their respective rights. Heard has paid to David Hickerson the amount of his debt bid upon the land, and at the same time discharged the complainant from his judgment against him. Heard should have a decree against Hickerson for the amount improperly paid to him on redemption; and against complainant for the amount of the debt against him which he bid upon the land. And to settle up the whole matter, the complainant should have a decree over against Hickerson for the amount overpaid to him. These amounts are all ascertained by the report of the Master below.

Upon examination of the exceptions, in view of the question as to the validity of the sale in favor of Heard—Hickerson having acquiesced in the account—we think the report, as modified by the chancellor, correct.

Affirm the entire decree of the Chancellor.

THE TENNESSEE & ALABAMA R. R. CO. v. E. W. ADAMS.

1. RAILROAD COMPANY. *Charter. Entering town or city.* The words, *from a town or city*, used in a charter granted to a railroad company, are to be taken *inclusively*; and in the construction of their road, they have the right to enter the *corporate limits* of such town or city.
2. SAME. *Same. Power of the Legislature.* The Legislature has the power to authorize the building of a railroad within a town or city, or upon a street or other public highway.
3. SAME. *Same. Construction of.* A railroad company can claim nothing that is not clearly given them in the act of incorporation; and any ambiguity in the terms of the charter must operate against the company, and in favor of the public.
4. SAME. *Same. Same. Incidental powers.* This rule of construction is not to deprive the company of the benefit arising from the obvious sense of the charter; and whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant.
5. SAME. *Same. Same. Public road.* The term *public road*, used in the charter of The Nashville and Chattanooga Railroad Company, does not embrace the streets and alleys of a city.
6. SAME. *Same. Same.* The power granted by the charter of a railroad company to construct their road within a city or town, carries with it, by implication, the power, if necessary, to locate their road upon a street or alley. And if a company be authorized to build a railroad by a straight line between two designated points, the power, by implication is conferred to run upon along, or across all the streets or roads which lie in the course of such line.
7. SAME. *Same. Same. Obstructions.* The company is allowed to create in the construction of their road such obstructions as cannot be avoided; but those that are not absolutely necessary to the making and using of their road, are unlawful. It is the duty of the company to leave public roads, streets and alleys as free from obstructions as they can; and to spare no reasonable expenditure of money or labor for that purpose.
8. SAME. *Same. Suit at common law. Remedy pointed out in the charter.* So long as a railroad company keep within their charter, they cannot be sued at common law, unless it be for injuries inflicted either wantonly, or from neglecting to use reasonable diligence and care.

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Compensation for land taken, or damage growing out of the use of a street, &c., must be obtained in the mode pointed out in the charter.

FROM DAVIDSON.

This cause was tried before his Hon. Judge BAXTER, at the September Term, 1858.

EWING and COOPER, for the plaintiff in error.

J. C. THOMPSON, for the defendant in error.

• WRIGHT, J., delivered the opinion of the Court.

The plaintiffs in error were incorporated for the purpose of constructing a railroad *from* Nashville by the way of Franklin, to the line between the State of Tennessee and Alabama, in the direction of Florence; and the first question is, whether, under their charter, they had the right, in the construction of their road, to enter the corporate limits of the city of Nashville? The circuit Judge was of opinion they had, and we think the weight of authority sustains him. The words, *from a town or city*, used in a charter for a work or improvement like this, it has been held, must be taken *inclusively*. The case of the *Commonwealth of Pennsylvania v. The Erie and North East R. R. Co.*, 27 Penn. State Rep., 339, is directly to this effect, and is supported by numerous other decisions. 1 Strange, 179, 181; 10 Johns., 389, 392; 6 Paige, 554; 7 Barb. Sup. Court Rep., 416.

The right of the legislative power to authorize the building of a railroad within a town, or city, or upon a street or other public highway, is not now to be doubted. 27 Penn. S. R., 339; 1 Barn. and Ad., 30; 23 Pick., 328; 7 Barb., 509; 2 Am. Railway C., 269; 1 Caine, 177.

Having a right then to enter the city, did the charter of the plaintiffs in error authorize them to occupy the bed of the particular alley in question with their road; and in so doing were they guilty of any actionable injury to the

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defendant? They can claim nothing that is not clearly given them by the act of incorporation. Any ambiguity in the terms of the charter must operate against them, and in favor of the public. 11 Pet., 544; 27 Penn. S. R., 339. Yet this rule of construction is not to deprive them of the benefit arising from the obvious sense of the charter; and, moreover, whatever is essential to the enjoyment of the thing granted will be, necessarily, implied in the grant.

This charter confers upon them all the rights, powers and privileges, and makes them subject to all the liabilities and restrictions contained in the charter of The Nashville and Chattanooga Railroad Company. In the charter of this latter corporation power is given to construct its road across or along any public road, so that said road shall not be thereby obstructed. And in another section it is prohibited from obstructing any public road, without constructing another as convenient as may be. The term *public road* as here used may not, and we think does not, embrace the streets and alleys of a city. But whether it does or not, there is nothing in this record to show that the plaintiffs in error, in the use of this alley, had been guilty of any trespass, or wrong toward the defendant. If it does not, the power to come within the city of Nashville carries with it, by implication, the power, if need be, to locate the road upon a street or alley: for instance, if a company be authorized to make a railroad, by a straight line between two designated points, this implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. So the power to enter the city, of necessity, gives the right to locate the road *somewhere*, and if need be, upon a street or alley. 27 Penn. S. R., 354-5; 1 Am. Railway C., 238, 328, 578, 580. It is not contended, nor is it shown that this alley was an unsuitable or improper location; and how can we assume that another alley, or a street, or private property should have been used in its stead? How can we say the plaintiffs have exceeded the discretion given them in the charter? Is it, *prima facie*, true even that in the construction of a railroad

in a city, private property, rather than a street or alley, is to be taken? It does not appear how far the use of this alley for ordinary purposes, is interfered with by this railroad: and if it did, it is not shown that the plaintiffs in error were not fully justified in its appropriation to the use of their road. 9 Paige, 170; 2 Am. Railway C., 579. *Prima facie* at least, we must take it they were. But if the term *public road*, as used in the charter of The Nashville and Chattanooga Railroad Company, embraces streets and alleys, still, although the company is allowed to use them so as not to obstruct them; yet it has been held, in order that the grant may have effect, that such a clause does not entirely forbid the company from going on any street or alley, and that they must be allowed to create such impediments as cannot be avoided. 27 Penn. State R., 356; Redfield, 520. But those which are not absolutely necessary to the making and using of the railroad are unlawful; and this is so whether the obstruction be expressly prohibited or not, and whether the company be expressly required to construct another road, or passway, or not. It is alike the duty of the railroad company to leave the street or alley, as nearly free from obstructions as they can, and for that purpose to spare no reasonable expenditure of money or labor. If, for instance, the railroad be made below the level of the street or alley, they must grade the rest of the street, or alley, also, if there be room, or it be possible, and that will make it better for the public accommodation. 27 Penn. State R., 356-7. A railroad running through the streets of a city may be so constructed and used as not materially to interfere with the use of the streets for ordinary purposes; and with the power possessed by the legislative and the municipal authorities of the city to regulate the running of cars or trains, may, ordinarily, be rendered harmless. 9 Paige, 170; 2 Am. Railway C., 579; Redfield, 616.

The plaintiffs in error, then, so far at least as we can see, did no wrong in occupying this alley, as their charter gave them the power to do so: and even if the defendant in error

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were entitled to compensation for land taken, or other damage growing necessarily out of the use of the alley by the railway, he must resort to the remedy given by the charter; and cannot, as he has done here, institute a common law action, treating the plaintiffs in error as wrongdoers. 3 Hum., 456; 2 Swan, 437. They are not wrongdoers, but act lawfully and rightfully, so long as they keep within their charter; and cannot be sued at common law, unless it be for injuries inflicted, either wantonly, or from neglecting to use reasonable diligence and care. 1 Hum., 403-8; 3 do., 456; Redfield, 520. They were justified by the statute, or charter. It did not require compensation, if any was due, to be made before the construction of the road. It is expressly otherwise, and gave the defendant in error, if he were entitled to any compensation or damage, a remedy in the mode designated in the charter—not by a common law action—and so compensation is made, it may follow as well as precede the taking of the property. Charter, sec. 24 and 25; 14 Wend., 51; Redfield, 114, 117, 118, 119, 122, 123, 147, 151.

Whatever, therefore, may be the damages, if any, or rather compensation, to which the defendant in error is entitled, the proof does not show that the plaintiffs in error have acted otherwise than their charter warranted, or that they have neglected to use reasonable diligence and care in the construction of their road, or wantonly, and without cause, inflicted injury upon the defendant. But this is necessary to enable him to maintain his action. He must show them to be wrongdoers. His suit is brought with this view and cannot stand in any other. 1 Hum., 403; 3 do., 456; 20 Howard, 135, 149.

Whether the defendant in error has any such interest in the soil of this alley, because it abuts upon his lot, as will entitle him to compensation on account of its being applied to railroad uses, in addition to its former use as a street, and whether he be entitled to any other damage because of the location of the railroad, are questions we need not now consider; his remedy, if any, being under the charter. Nor

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do we consider what power the city authorities of Nashville had to grant the use, or soil of this alley for railway purposes; nor how far this particular license affected the claim of the defendant in error, or enlarged the powers of the plaintiffs in error. These are questions involving much conflict of authority. 6 Yer., 497, 501; 27 Penn. State Rep., 358; Redfield, 158 to 163, 520, 616, 619, and notes with cases cited.

It is sufficient that the Circuit Judge erred in instructing the jury that this action could be maintained against the plaintiffs in error, treating them thereby as wrongdoers, when it does not appear in the proof that they have acted otherwise than as their charter warranted them in doing.

The judgment of the circuit court must, therefore, be reversed, and the cause remanded for another trial.

JOHN G. JOHNSON v. JOHN O'NEAL.

1. PRACTICE AND PLEADING. *Demurrer. Code, § 2934.* A demurrer, under § 2934 of the Code cannot be noticed unless the causes of demurrer are set out in it. If a demurrer is filed and the action of the Court not demanded on it, its sufficiency will be taken for granted.
2. SAME. *Same. Abandonment. Presumption.* If the defendant files several pleas to a declaration, to some of which the plaintiff demurs, and takes issue on the rest; and the defendant goes to trial upon those pleas upon which issue was taken, without demanding the action of the Court upon the others, it will be presumed that he has abandoned them as defences.

FROM BEDFORD.

This cause was tried at the December Term, 1858, before Judge DAVIDSON.

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B. M. TILLMAN, for the plaintiff in error.

WISENER and NEIL, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

THIS is an action upon two bonds for \$2933.32. The pleas are, *nil debet*, payment, and a special plea in these words: "The defendant pleads failure of consideration in this, that said bills single were given by defendant for a certain tract or parcel of land sold and *conveyed by deed*, by plaintiff to defendant, and defendant avers that for a portion of said land, plaintiff had and now has no title, and could not make a title to defendant, and that he is ready to verify."

To this, as well as the plea of *nil debet*, there is entered the words, "demurrer" and "joinder," signed by the respective counsel. There is no action of the court upon either, and the jury find upon the plea of "payment," upon which issue was joined in favor of the plaintiff.

If the demurrer could be noticed at all, as it cannot, because the ground of it is not set out, (Code, 2934.) it would be taken as admitted to be sufficient, because the action of the court was not demanded, and issue required, unless it appeared by bill of exception or otherwise that the jury had passed upon them, in which case the demurrer would be presumed to have been waived.

The defendant having gone to trial upon his plea of payment and issue thereon, and no notice having been taken of or proof offered under his other pleas, we must presume that he abandoned them as defences to the action. In this view the sufficiency of the pleas as defences need not be examined.

No merits are shown in the defence by bill of exceptions, or any erroneous action of the court, and a sufficient cause of action is made out in the declaration, which the jury has sustained, upon the only issue submitted to them.

We cannot, therefore, reverse; but the judgment must be affirmed.

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J. H. DAVIS v. JOHN JONES.

1. **JURISDICTION.** *Power of Court after appeal, or change of venue.* After a cause has been transferred from one court to another, whether by appeal or change of venue, the court from which it has gone cannot proceed further in it. Whatever purports to be posterior to the loss of jurisdiction is, therefore, erroneous, and probably void.
2. **SAME.** *Same. Record.* But this principle does not extend to acts purporting to have been done while the court had jurisdiction. Every court is the exclusive judge of its own records, and is competent to make them speak the truth touching its own proceedings.
3. **SAME.** *Same. Same.* The court cannot, after it has lost jurisdiction of a cause by appeal or otherwise do things omitted to be done together, but it may make its records speak the truth as to things that were done, but omitted to be entered.
4. **SAME.** *Same. Bill of exceptions.* If a bill of exceptions does not show that it contains all the evidence in the cause, the court cannot, at a subsequent term, after an appeal is prayed and granted, amend the same in this particular. It is an act omitted to be done, and not an act done and omitted to be entered of record.
5. **BILL OF EXCEPTIONS.** *Presumption as to sufficiency of evidence.* If the bill of exceptions does not show that it contains all the evidence in the cause, the court will presume that there was testimony other than that copied into the transcript which fully sustains the verdict and judgment below.
6. **LAND LAW.** *Evidence. Boundary. Declarations of former owners.* For the purpose of ascertaining the true line of a disputed and uncertain boundary between adjacent tracts of land, the acts and declarations of the former owners and proprietors which took place and were made during such ownership, especially if accompanied with possession, conducing to establish the common line, are admissible as original evidence.
7. **SAME.** *Same. Same. Same.* This is so, whether such owners be dead or living—competent or incompetent as witnesses in the controversy. They do not stand upon the same footing as the declarations of third persons.

FROM SMITH.

This cause was tried before GARDENHIRE, J. Verdict and judgment for plaintiff.

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MCLAIN and HEAD, for plaintiff in error.

J. B. MOORES, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

The bill of exceptions which was made up at the trial term in November, 1858, omitted to state that it contained all the evidence used in the case. To be relieved from the consequence of this omission the defendant below, who lost the cause and whose business it was to see that the bill of exceptions was properly made out, at the July term, 1859, moved the Court for leave to amend the bill of exceptions by stating that the same, as signed, sealed, and made part of the record at the November term, 1858, contained all the evidence that was before the jury at the trial of the cause at said November term, at the same time proposing to the attorney of the plaintiff that he might insert any evidence before the jury and not included in said bill of exceptions. No further evidence was inserted, and the Court being of opinion that said bill of exceptions contained all the evidence before the jury at the trial of the cause, the amendment was made. To this the plaintiff excepted. In support of this practice we have been referred to the case of *The State v. Reid*, 1 Dev. & Batt. R. 381, and other decisions in the State of North Carolina. These authorities are not directly upon a case like this, and appear to me, in principle, to differ from it. They seem to relate to amendments, *nunc pro tunc*, allowed in the inferior court, after appeal or writ of error and transcript in the superior court being made to conform to them, they are not open to inquiry in another court, either as to their propriety, or as to the periods at which they are made. The rule as stated by Judge Ruffin in the *The State v. Reid*, is that after a case has been transferred from one court to another, whether by appeal or change of venue, the court from which it has gone cannot proceed further in it. Whatever purports to be *posterior* to the loss of jurisdiction is, therefore, erroneous, and probably void. But the princi-

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ple extends no farther. When the action of the court is not a subsequent adjudication, nor anything preparatory to an adjudication to be had in that court, but relates to *what was done in the cause while in that court*, there is a plain difference. No usurpation of authority then appears. *The act purports to have been done while the court had jurisdiction*; and as to the point of fact the statement cannot be questioned by any other court. Every court is the exclusive judge of its own records, and is competent to make them speak the truth as to its own proceedings. Now this seems to me necessarily to relate to *things done* in the inferior court, the entry of which upon the records, was omitted, but not *to things omitted to be done by the court altogether*. Here the material statements in the bill of exceptions, that this was all the evidence, was not made, or ordered to be made at all, but so far as we can see, entirely escaped the court and the parties, until an appeal had been taken and the term had passed by an adjournment. Nor is anything to the contrary of this assumed in the amendment. But it is made because the court *then, at the July term, 1859*, was of opinion the bill of exceptions contained all the evidence.

But whatever may be the extent to which the decisions in North Carolina have gone, we understand our own adjudications to be decidedly against the exercise of the authority taken by the Circuit Judge. *Stuygs v. The State*, 3 Hum., 372-375; *Farrell v. Alder, Adm'r*, 2 Swan, 77.

The bill of exceptions then, not being full, the chief part of the argument for the plaintiff in error loses its effect. It cannot be assumed that the plaintiff below had shown no title to the land in dispute, either by a regular chain of conveyances, or twenty years' possession; but, on the contrary, in support of the verdict, we will presume that there was evidence, other than that copied into the transcript, which established a perfect title in the plaintiff. 1 Meigs' Dig. 124. And if need be, we must also presume that this evidence not only showed a valid paper title from the buckeye, north, as claimed by the plaintiff, but also that this line had been actually marked and established.

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The charge of the Circuit Judge is complained of; but after a careful consideration of it, especially in reference to what we must take the facts in the case to be, we have been unable to detect any error in it. After stating to the jury that upon principle and consulting the convenience of mankind, a line called for and described, either in a grant or deed, as a common boundary of adjacent tracts, might be fixed by the verbal agreement of the parties whose common line it is, and that this might be done by express testimony, or by circumstances from which it is inferable; that some of these are long acquiescence of both parties, and frequently speaking of this limit as the boundary between them, he proceeds to say, that if the line, or course north from the buckeye, was not originally the true line, and its locality was uncertain, it might be established at that point by such acts and acquiescence. It is this latter part of the charge which is questioned. But it seems to us to be supported by *Levallen v. Overton*, 9 Hum., 76; also authorities in 1 Meigs' Dig., 153. If further or other instructions were desired as to another line they should have been demanded of the court. Until then, the omission to charge as to the line further east, if the fact be so, could not put the court in error.

We understand that for the purpose of ascertaining the true line of a disputed and uncertain boundary between adjacent tracts, the acts and declarations of the former owners and proprietors, which took place and were made during such ownership, especially if accompanied with *possession*, conducing to establish the common line, are admissible as original evidence. 1 Meigs' Dig., 151, 152, 153. This is so, whether they be dead or alive, admissible or inadmissible as witnesses in the controversy. They do not stand upon the same footing as the declarations of *third persons*. 2 Dev. & Batt., R., 241. Then there is no error as to this matter.

Neither are we able to see that the Circuit Judge erred in permitting the deposition of James R. Cheek to be read,

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even under the law as laid down in *Reed v. Shenck*, 2 Dev. 415; certainly not under our own decisions, and especially when the very *general* description of the land, embraced in E. Cheek's deed, is considered. The object was to identify the land included in the deed and which had been purchased by the plaintiff in error.

We therefore affirm the judgment of the Circuit Court, and do so the more cheerfully because, from the record before us, we are satisfied the merits of the case have been reached.

ROBERT A. COX, v. E. M. CARSON *et al.*

LIEN. *Vendor's Mortgage.* The vendor's lien has priority of satisfaction over the claim of a party who advanced to one of two joint purchasers, money to be applied to the payment, in part, of the purchase money, and took a mortgage on the interest in the land of such joint purchaser. The taking of the mortgage shows that the loan was intended to create a debt against the borrower, and that it was not considered as a payment towards the land.

FROM JACKSON.

This cause was heard before Chancellor RIDLEY, who decreed for the complainant. The defendants appealed.

J. P. MURRY, for the complainants.

QUARLES, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This case presents a question of conflicting equities and liens.

In June, 1857, Cox and Edward T. Carson purchased a tract of land of twenty acres, with a ferry, on Cumberland

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river, in Jackson county, of Trice Hall, at \$1400, and received a conveyance from him of that date. They executed their joint notes to John H. Eaton, the vendor of Hall, for the consideration which is not yet fully paid. The bill charges that complainant paid \$269, and Edward T. Carson only about \$80. In April, 1858, complainant sold out his interest to his partner, E. T. Carson, for \$750, and took his obligation to pay all their joint debts, including those due for the land to Eaton and others, and gave him a bond for title. This bill is filed for the sale of the land for the payment of the amount still due on the original joint purchase, and then for the debt due to himself upon the sale made by himself to his partner.

To this relief there could be no objection if there were nothing else in the case. But Edward M. Carson, the father of Edward T., who was dead at the time of filing the bill, and his heirs are made parties, sets up a claim of priority in his answer, and by cross-bill, by virtue of a certain payment made by him to the original vendor, and a mortgage from the said Edward T. Carson upon the same land, to secure the same, together with another debt of \$75 he had against him. The land was sold under an interlocutory decree for \$985, and the contest is for the fund. The case was referred to the Master for an account of the respective claims of the parties. He found that there was still due and unpaid, including interest, by Cox and Carson on the debts for the land and ferry \$794.96, and that Cox had advanced for the land \$252.95, including interest. It also appeared that Edward T. was indebted to Edward M. Carson, \$481.68. To secure this the deed of trust or mortgage upon this land was executed on the 24th July, 1858. This it will be seen was after the sale of his undivided moiety by Cox to his partner. There can be no question as to the right of complainant to have the fund applied to the balance of the consideration of the land yet due by him and Edward T., against any rights of Edward M. Carson, under the mortgage. And in addition to this, the complainant has the vendor's lien for

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the \$750 for which he sold his interest to his partner, which would also be paramount to the rights of Edward M. Carson, by virtue of his mortgage. This is all very clear. But another ground is assumed for Edward M. He advanced upwards of \$300 to Edward T. Carson at the time of taking the deed of trust, which he says was applied to the land debt to Eaton, and, therefore, he insists that he has a right to occupy the vantage ground of the vendor to that extent, as regards his lien. The fact of securing himself by mortgage shows that he loaned the money to his son, and considered it only as a debt against him, and not a payment towards the land, so as to create any equities in his favor, by substitution, or resulting trust. Upon the whole, we think the Chancellor correctly held that the proceeds of the land should go, first, to the payment of the amount still due of the original consideration, and then to the complainant for the amount advanced by him on the purchase, as well as his debt for the one-half sold to Edward T. Carson, if anything should be left after paying the joint debts against them. So there will be nothing left to pass under the mortgage. The fund for rents in the hands of complainant will also be applied as directed by the Chancellor.

The whole decree is affirmed, and the cost in this court will be paid by Edward M. Carson, and the cost below as directed by the Chancellor, and the cause remanded.

 THE STATE FOR NOLIN'S USE PARCHMEN *et al.*

1. CONSTITUTIONAL LAW. *Sheriff. Constable. Official term of.* The constitution simply prescribes the mode of appointment, and the duration of the term of office of sheriffs and constables. The time and manner of qualification are left to be regulated by the Legislature.
2. SAME. *Same. Same. Same. Act of 1835, ch. 1, sec. 12.* By the act of 1835, ch. 1, sec. 12, the officer holding the election for constables

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is required to certify the result of the election to the County Court; and, thereupon, said Court shall take bond and security from the party elected and qualify him as now prescribed by law; *after which said party shall enter upon the duties of the office of constable.* His official term of "two years," therefore, commences from the date of his qualification; and not from the day of his election to the office.

3. **EXECUTION. Return of. Sheriff.** The sheriff has the whole intervening period between the time an execution comes to his hands and the return day to execute it; unless by delay the debt might be lost or put in jeopardy; and if his term of office expires before the return day of an execution the only duty imposed on the outgoing sheriff is to deliver over the process to his successor.
4. **SAME. Same. Same. Sureties.** A sheriff has no power to execute or return an execution after his term of office is at an end; unless while in office he had begun its execution; and a failure to execute and return an execution in such a case is not a breach of the condition of his bond, so as to charge his sureties.
5. **SAME. Same. Same. Delivery of process to successor.** The neglect of the sheriff to deliver over process remaining unexecuted in his hands, upon the expiration of his official term, to his successor, is not an official omission or neglect, within the condition of his bond, so as to charge his sureties.
6. **SAME. Same. Same. Same. Question reserved.** If an execution is placed in the hands of the sheriff, and retained by him with the knowledge and by the express direction of the plaintiff, can any default be imputed to him for failing to execute and return it?

FROM STEWART.

Verdict and judgment for the defendants. Plaintiffs appealed.

KIMBLE, for plaintiff in error.

HOUSE, for defendants in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of covenant brought by Nolin against Parchmen (as former sheriff of Stewart county,) and the

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sureties to his official bond, for alleged breaches of the condition thereof.

It appears from the bill of exceptions, that the defendant, Parchmen, was duly elected sheriff of said county on the 4th day of March, 1854, the day fixed by law for such elections; and that on the 3d day of April following, he executed the bonds required by law, and was regularly qualified and inducted into office by the county court of said county.

It further appears, that on the 11th day of March, 1856, an execution issued from the office of the circuit court of said county, founded on a judgment in favor of Nolin, the plaintiff, against Newell and Pritchett, for \$1081.09, tested of the March term, 1856, of said court, and returnable to the July term ensuing; which execution came to the hands of Brandon, one of the deputy sheriffs of said county, by the special direction of the plaintiff, Nolin, a day or two after its issuance.

It likewise appears, that at the election on the first Saturday of March, 1856, one Bogard was elected to the office of sheriff of said county, and on the 3d of April, 1856, the latter was duly qualified and entered upon the execution of the duties of his office.

It does not appear that, in point of fact, Parchmen, whose term of office had nearly expired, had knowledge of the fact of the issuance or delivery of said execution to his deputy. The proof shows that Brandon, the deputy, retained the execution in his hands; and that on the 8th of July, 1856, he received a payment of \$700 from the defendants in the execution, which he credited thereon, and paid the same over to the plaintiff a few days thereafter. And on the 1st of December, 1856, he returned said execution to the clerk, and procured the issuance of an *alias* execution. The proof tends to establish pretty clearly that Brandon acted as the agent of the plaintiff in this matter, and that he had permission from the plaintiff to retain and hold up the execution.

In November, 1856, Newell and Pritchett, the judgment

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debtors failed ; in consequence of which the residue of the plaintiff's judgment remains uncollected.

Upon this state of the facts, several breaches of the condition of the official bond of Parchmen are assigned, of which only two need be noticed. First, the failure to execute and make due return of said execution to the July term, to which it was returnable. And, secondly, the neglect of Parchmen, on going out of office, to deliver the same over to his successor.

In answer to the first breach assigned, it is said for the defendants, that, in law, Parchmen was not sheriff at the date of the issuance of the execution, namely, on the 11th day of March, 1856 : that, under the constitution (Art. 6, sec. 15,) the term must be held to commence from the day of the election, which, in this particular instance, was on the 4th day of March, 1854, and consequently the official term had expired before the day of the issuance of said execution. This position is not tenable. The constitution simply prescribes the mode of appointment, and the duration of the term. The time and manner of qualification are left to be regulated by the Legislature : and by the act of 1835, ch. 1, sec. 12, the officer holding the election for constables is required to certify the result of the election to the county court, "and, thereupon, said court shall take bond and security from said constable or constables, and qualify him as now prescribed by law ; *after which said constable or constables shall enter upon the duties of the office of constable.*" From this express provision of the statute it is clear that the official term of "two years" commences from the date of the qualification of the constable, and not from the day of his election to the office.

The available answer to the first breach is, that the official term of the sheriff having expired some twenty days after the execution was placed in the hands of his deputy, he cannot be charged with a breach of the condition of the bond, by reason of the failure to execute and return the

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process. The execution, as we have seen, was not returnable for more than three months after the expiration of the sheriff's term. In general, all that can be required of the sheriff is, that he shall duly execute process before the return day thereof. He has the whole intervening period, between the time it comes to his hands and the return day, to do this, unless in cases where, by delay in the execution thereof, the debt might be lost or put in jeopardy.

It has been held that where the sheriff's term expires, as in the present case, the only duty imposed upon the outgoing sheriff, is to deliver over the process to his successor ; because he has no power to execute or return the same after his term was at an end, unless, while in office he had begun its execution. 7 Humph., 447 ; 3 Humph., 398, 419 ; 2 Sneed, 18. These cases establish that a failure to execute and return an execution, in such a case, is not a breach of the condition of the bond, so as to charge the sureties of the officer.

2d. It is equally clear that the neglect of the sheriff to deliver over the process, remaining unexecuted in his hands, to his successor, is not an official omission or neglect within the condition of the bond, so as charge the sureties. In contemplation of law, it is a duty to be performed by the individual, *after his office has ceased*, and with it, his power to do any other official act, except such as are properly within the scope of the statute giving time to wind up his business. And this duty resting upon him, it might be conceded that he would be answerable, individually, in an action on the case, for neglecting to do so. But it is clear that it is a duty not within the condition of the bond, and, therefore, his sureties cannot be made liable.

Again : a successful defence to the action might, perhaps, be rested on the ground, that, the execution was placed in the hands of Brandon, and retained by him, with the knowledge and by the express direction of the plaintiff, upon his own responsibility and at his own peril, and that, consequently, no default can be imputed to the sheriff for failing

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to execute it or return it. This ground is not necessary, however, to the determination of the present case. There is no error in the record.

Judgment affirmed.

ANDERSON et al. v. MCCULLOUGH et al.

WILL. Construction of. Power coupled with a trust. Advancements. After devising all his personal and real estate to his wife, the testator used this language; "Believing that she will make an equitable distribution of the property, at her death, among our children. * * * She is getting old and infirm, and when I am gone this power to give will make them, I hope, dutiful and affectionate to her, as I hereby give her the power to reward those that are most dutiful to her."

Afterwards a plantation and mills, which the testator thought would return to his estate, were devised to one of his sons. Held:

1. That the paper last executed must be read in connection with, and as part of the will, and that its effect is to give the plantation, mills, etc., to the testator's son, as an advancement, leaving the will, in all other respects, intact.
2. That under the will the widow took a life estate in the property, with a power of appointment coupled with a trust: the will not conferring a mere naked power, which the party might or might not execute in her discretion.
3. That the widow may make a just and reasonable discrimination in the division of the property, based upon the good or ill conduct of the children towards her after testator's death; but there must be a real and substantial allotment to each one in the distribution.
4. The power of appointment being coupled with a valid trust, and the widow having died without executing the power, a court of equity will hold the trust to survive, and will decree its execution; it would be otherwise if it was a mere naked power, not coupled with a trust.
5. In decreeing the execution of the trust, the court will, as far as practicable, carry out the wishes and intentions of the testator, apparent from the face of the will, if there is nothing inequitable or improper in itself, in its provisions.

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6. The inquiry as to whether the children were alike dutiful to their mother, she having died, is impracticable; the facts are not capable of ascertainment, in any satisfactory mode. All that the Court can do is to give effect to the general intention of the donor.
7. In order that words of recommendation, entreaty or wish, shall be held to create a trust, it is necessary; first, that the words are so used that upon the whole they ought to be construed as imperative; secondly, the subject of the recommendation or wish be certain; and, thirdly, that the objects or persons intended to have the benefit of the recommendation or wish, be also certain.

FROM MAURY.

FLEMING, for complainants.

GANT and RANEY, for defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainants are the administrators with the will annexed of the estate of Robert Wallis, who died in Maury county, in 1846. Some years before his death, said Robert Wallis made a will, and afterwards executed another paper of a testamentary nature, and to have the proper construction of these papers declared, was the purpose of the present bill.

The testator left surviving him his wife and five children and four grand-children, the children of his son, John Wallis, who died after the making of the will.

Margaret Wallis, widow of the testator, was nominated executrix of the will, and qualified as such. She died intestate, in 1858, and complainants were appointed administrators of her estate; and administration on the estate of the testator, with the will annexed, was also granted to them.

The estate of the testator consisted of lands, slaves, and other personal property, which he devised and bequeathed as follows, viz :

"I, Robert Wallis, do hereby give and bequeath to my dear wife, Margaret, all my real estate, personal and mixed

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estate, believing that she will make an equitable distribution of the property, at her death, among our children ; as she knows better than any other person what part they each of them have already received : she is getting old and infirm. and when I am gone this power to give will make them, I hope, dutiful and affectionate to her. as I hereby give her the power to reward those that are the most dutiful to her. Any part that may be given to my son John's children, I request may be laid out in their education, as he has proven so unsteady ; no part of my estate is to be given him, in any way, or at any time, unless secured to his children, so sure I am that he would waste it." This will bears date the 16th of January, 1836.

Afterwards, on the 16th of February, 1839, said Robert Wallis executed the following paper, viz :

"I, Robert Wallis, of Maury county, State of Tennessee, being in sound mind and good health, but considering the great uncertainty of human life, have thought it best to arrange my affairs as I wish them hereafter to stand. I have given a part of my property to each of my children, as they married or settled in life. I have made my will and provided for my dear, affectionate wife, Margaret D. Wallis. Believing the plantation, mills, &c., on which Samuel T. Tillman now lives, will return to me, as I believe he will be unable to pay for them ; if this does take place, I hereby, at my death, give and bequeath to my dear son, Robert M. Wallis, all the right, title and interest I may hereafter have to that property."

Margaret Wallis, the widow, died intestate in 1858, without having made any distribution of the property amongst her children and grand-children, as contemplated by the will of the testator.

1st. We are of opinion that the paper of the 16th of February, 1839, must be read in connection with, and as part of the will ; and that its effect is simply to give "the plantation, mills, &c.," (which did, in fact, fall back to the testator,)

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to his son Robert M. Wallis, as an advancement, leaving the will in all other respects, intact.

2d. We are of opinion that under the will, the widow took a life estate in the property, with a power of appointment coupled with a trust.

The position that, by the language of the will, the widow had an absolute and uncontrollable power over the property, is not tenable. The gift is to her—"believing that she will make an equitable distribution of the property, at her death, among our children, as she knows better than any other person, what part each one of them has already received." The intention of the testator, that the widow, at her death, *should* distribute the property equitably amongst the children, is here clearly manifested. According to the current of authorities, these words must be construed to be imperative, and not as conferring merely a naked power, which the party might or might not execute, in her discretion. In the case of *Wright v. Atkyns*, 1 Turn. & Russ., 157, cited in note to sec. 1070, 2 Story's Eq. Jur., Lord Eldon says, that in order that words of recommendation, entreaty, or wish, shall be held to create a trust, it is necessary, first, that the words are so used, that upon the whole, they ought to be construed as imperative; secondly, that the subject of the recommendation or wish, be certain; and, thirdly, that the objects or persons intended to have the benefit of the recommendation or wish, be also certain. According to this rule, it is clear that a valid trust is here created.

The only *discretion* vested in the widow was in regard to the *equality* of the distribution. The rule for the distribution of the property is prescribed; it is to be an equitable, that is, an equal distribution, subject to the qualification, not that she may appoint to such of the persons named in the will, as she may think proper, but simply that she may bestow a reward upon such of them as are most dutiful; in other words, she may make a just and reasonable discrimination, in the division of the property, based upon the good or ill

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conduct of the children towards her after testator's death. But, still, the language of the will demands a real and substantial allotment to each one in the distribution.

3d. The power of appointment being coupled with a valid trust, and the widow having died without executing the power, a court of equity will hold the trust to survive, and will decree its execution ; of course it would be otherwise in the case of a mere naked power, not coupled with a trust. 2 Story's Eq. Jur., Sec. 1061.

And in decreeing the execution of the trust, the court will have respect, as far as practicable, to the wishes and intentions of the testator, apparent from the face of the will ; and will mould its decree accordingly, if there be nothing inequitable, or improper in itself, in the provisions of the will. But it is obvious that this cannot always be done, to the full extent of the testator's intentions. The present case furnishes an illustration of its impracticability in some instances.

The general intention of the donor of the power, that there shall be an equal distribution of the property amongst the persons named, is clearly expressed ; but there is likewise a particular intention, no less clearly indicated, by which, under certain circumstances, an inequality in the distribution may be produced. And this is left entirely to the discretion and judgment of the donee of the power. The particular intention is to have effect or not, according to the donee's own individual views of the relative dutifulness of the several children. Now, it is plain that, the donee having died without executing the power, the court, when called on to execute the trust, cannot place itself in the shoes of the donee, so far as to inquire or decide whether or not the children were alike dutiful to their mother. The inquiry is impracticable ; the facts are not capable of ascertainment, in any satisfactory mode ; and were it otherwise, the judgment of the chancellor and of the mother might differ very widely ; in the heart of the mother, perchance, the prodigal son might still be the favorite, and thought worthy of the " double

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portion " All that the court can do, therefore, in such cases, is to give effect to the general intention of the donor. Hence, in the present casē, the distribution must be equal, in the general sense contemplated by the testator: that is, after collating the advancements, and holding each one to account for whatever amount he may have received, by way of advancement, either in the lifetime of the testator or from the widow. The grand-children stand upon equal footing, under the will, with the children of the testator, and will be entitled to one sixth part of the property or its proceeds.

The value of " the plantation, mills, &c.," will be charged to Robert M. Wallis at its reasonable value, at the death of the testator.

Decree affirmed.

SEWANEE MINING COMPANY v. MCCALL.

1. **PRINCIPAL AND AGENT.** *General and special authorities. Bill of Exchange.* General authorities to transact business and to receive and discharge debts do not confer upon an agent the power of accepting or endorsing bills so as to charge the principal. Special authorities to accept or endorse bills are construed strictly.
2. **SAME.** *Same. Acceptance of bills by Agent.* The power to accept bills, so as to charge the principal, is one of too much importance and too liable to be abused, to be held to exist unless it be given in terms, or be manifestly proper and necessary to effectuate the purposes of the agency.
3. **SAME.** *Same. Extraordinary emergency.* The acceptance of bills, by an agent, to avoid the suspension of work of great importance to the principal, does not fall within that class of cases of extraordinary

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emergency, or overruling necessity, in which from the very necessities of the case, an agent is justified in deviating from the authority conferred on him.

FROM DAVIDSON.

Verdict and judgment for the plaintiff. The defendant appealed.

MEIGS, for the plaintiff in error.

A. EWING, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt, on simple contract, brought by McCall against the company. Judgment for the plaintiff, and an appeal in error to this Court by the defendant.

The single question presented for our determination is, whether or not the company is bound by the act of its general agent, in accepting a bill drawn by Best & Co., on the defendant, in favor of McCall, upon the following state of facts.

The Sewanee Mining Company was incorporated by an act of the General Assembly, with authority to construct a railroad on the Cumberland Mountain leading to its coal-mines. Best & Co., were employed as contractors to build said road; and while engaged in the performance of the work, they became indebted to McCall in the sum of \$1060.90, for tools and materials furnished to them, by him, and used in the construction of the road. In discharge of this debt, Best & Co., on the 13th of October, 1857, drew a bill on the Sewanee Mining Company in favor of McCall, which was accepted by Backus, as general agent of said company, in the absence of the President.

The proof shows that the stockholders, directors, and officers of the company are non-residents; that, in the absence of the President, Backus acted as its general agent; that he

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was also chief engineer of the company ; that he had authority to draw on S. F. Tracy, as President of the company, but was instructed not to draw except in case of necessity ; but that he had no special authority to accept drafts or bills drawn on the company ; and that he accepted the bill in question in the absence of the President at New York, because McCall threatened to attach the effects of Best & Co., on the road, for the satisfaction of his debt, which would have stopped the work, and have been disastrous to the interests of the road, and he thought it the best course he could take for the interest of the company, under the circumstances, to accept the bill, so that the work might go on.

The proof tends to establish that at the time of the acceptance of said bill, the Sewanee Company would probably have been found indebted to Best & Co., in a "small amount," if their account had been settled then ; but that at the time of the institution of this suit, no such indebtedness existed. It appears that Tracy, the President of the Company, remained absent from Tennessee until February, 1858, and that, on his return, he disavowed and repudiated the act of the agent in accepting said bill, of which act it does not appear that he had any notice, until after his return.

The Circuit Judge instructed the jury, in substance, that the acceptance of the bill, under the circumstances would bind the company.

The authorities to which we have been referred, do not, in our judgment, support the charge of his honor. The weight of authority, we think, clearly establishes the reverse of the proposition stated in the charge, to be the law. In *Byles on Bills*, 22, marg., it is distinctly laid down that "general authorities to transact business, and to receive and discharge debts, do not confer upon an agent the power of accepting or endorsing bills, so as to charge his principal." And for this numerous authorities are cited in the note. This author also asserts the principle that "special authorities to accept or endorse bills are construed strictly." *Ibid.* The same doctrine is substantially maintained in *Story on Agency*, secs.

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62, 63, 64, 66, 67, where several cases are referred to and commented on.

The power to accept bills, so as to charge the principal, is one of too much importance, and too liable to be abused, to be held to exist, unless it be given in terms, or be manifestly proper and necessary to effectuate the purposes of the agency.

In the present case, the power cannot be implied, as incidental to the authority conferred on the agent; because it was not within the scope of the authority given; it was not a necessary or usual means of executing the authority.

Nor does it fall within that class of cases of extraordinary emergency, or overruling necessity, in which, from the very necessities of the case, an agent is justified in a deviation from the authority conferred on him. See Story on Agency, secs. 85, 141, 194, 208.

It is clear that, under the circumstances, the agent would not have been authorized to accept a bill, even in discharge of a debt due from the principal; much less could he do so in discharge of a debt from a third person, for which the principal was not legally liable.

Judgment reversed.

WILLIAM LAMBERT v. JAMES PHARIS.

EVIDENCE. *Slander. General character.* In actions of slander, the plaintiff's general character upon the trait involved in the charge is put in issue, and may be proven; but his general character upon traits not involved in the charge, or special charges, or other crimes, or suspicions and rumors, are not admissible.

FROM JACKSON.

This cause was heard before his Honor, Judge FITE. The plaintiff appealed.

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J. P. MURRY, for the plaintiff.

QUARLES, TURNEY, DENTON and MCHENRY, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This is an action of slander for the imputation of perjury.

The actionable words used by the defendant were in substance, that the plaintiff was examined as a witness in the Circuit Court of Jackson, in a suit then pending by appeal, in which Maria Maners was plaintiff, and the said Pharis defendant, and that he falsely swore that he had no interest in the suit, and had given no counsel or advice to Mrs. Maners in relation to the suit, and was, therefore, guilty of the crime of perjury.

The defendant plead not guilty, the statute of limitations, and justification—that the charge was true. Upon this last plea the contest was made, and the jury found it for the defendant.

We find nothing in the errors assigned in the argument for the plaintiff entitled to consideration, except the rulings of the court in relation to the evidence of character.

Milton Draper was asked by defendant's counsel, "was it not generally reported and believed in the neighborhood of plaintiff that he burnt Pharis' crib." This question was objected to, but allowed and answered in the affirmative. Several other witnesses were permitted to answer the same and similar questions, in relation to that and other reports against him in relation to the crimes of perjury, larceny, &c. This was certainly going beyond all the cases and authorities on that subject. The plaintiff's general character, and that only, upon the trait involved in the charge, in this case false swearing, is put in issue, in actions of slander. 1 Green. Ev., 55; 11 Hump., 614. He is supposed to be always prepared to defend that, when he sues for character, but not all the special charges that may be brought against him, and not even his general character upon traits not involved in the

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charge. Much less is he presumed to be ready to meet all that report and rumor may have thrown out against him. The only charge upon his character, which is open for investigation, is that for which he sues—in this case, the perjury specified. Nor can that be proven unless there be a plea of justification averring its truth. It would be a very strange incongruity in the law to exclude all evidence of the truth of the very charge upon which the suit is brought, unless notice is given to the plaintiff, by a very special plea, and not even then, by rumor or report, (2 Greenleaf, 426,) but still allow proof of other crimes, and even rumors and suspicions of crimes of equal enormity.

It was going a good ways, and against a heavy current of authority, (2 Green. Ev., 275,) to admit proof in mitigation of damages, under the general issue, that “it was generally *reported and believed* that the words spoken” by the defendant “were true.” *West v. Walker*, 2 Swan, 33. But this case has been adhered to, and is not now disapproved, but is re-regarded as standing upon good reason, and respectable authority. That rule is, of course, confined to the specific charge on which the suit is based. The practice adopted in this case would render these actions, already expensive and protracted, interminable and ruinous. Instead of confining the proof strictly to the truth or falsehood of the charge of perjury in the specified case, other perjuries, larcenies, arsons, &c., would have to be investigated.

The error is too palpable for debate. All the evidence in the case, and there is a volume of it, in which the plaintiff is impeached upon general character as a witness, is irrelevant and improper. Witnesses can only be properly interrogated as to his general character as to the crime of perjury, not whether they would believe him or not. That is not material to the issue. The question is whether he has sworn falsely in the case specified, and that is not to be decided by the opinions of witnesses, but the proof of facts. But his general character on the subject of swearing is open for investigation, not any particular instance even of that

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offence. But not even his *general* character as to any other trait can be gone into, much less particular offences; and still less, rumors and reports as to other crimes.

Let the judgment be reversed, and the case remanded for a new trial.

E. L. & A. E. COLCORD v. A. J. HALL.

FORCIBLE ENTRY AND DETAINER. *Agreement. Construction of.* By an instrument of writing, the plaintiffs in error specified certain services to be performed by the defendant for which he was "to have the house rent, use of garden, fire-wood, and pasturage for what cows you keep for family use. Mr. A. J. Hall to hold possession until 25th of December, 1859, and said Hall to have entire control of the premises as agent for Ariand E. Colcord." Held: that Hall was not a mere agent, but took an interest in the premises as the lessee of A. E. Colcord, and was entitled to the possession until the 25th December, 1859, and if wrongfully turned out of possession, could maintain an action of forcible entry and detainer to be restored to the same.

FROM WHITE.

This cause was tried before Judge GARDENHIRE, at the May Term, 1859.

SAM'L TURNER, for the plaintiff in error.

COLMS, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This is an action of forcible entry and detainer. The

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determination of the case depends entirely upon the construction of the following instrument of writing between the parties :

"THINGS THAT I WANT DONE.

" Fence at common put up—to keep all the fences up and sure to keep out the hogs and other stock. I wish you to do the best you can with the potatoes and oats, and also the clover, and to collect the pasturage, and to receive the money for me, and for you to use what money so collected, and for sale of potatoes, oats, &c., to be applied to the payment of taxes and building of fence, &c., and for the rendering of the above services to have the house rent, use of garden, firewood, and pasturage for what cows you keep for family use. Mr. A. J. Hall to hold possession until the 25th of December 1859, and said Hall to have entire control of the premises as agent for Ariand E. Colcord.

" E. L. COLCORD, for

" ARIAND E. COLCORD.

"Sparta, August 16, '58."

The premises in dispute belonged to Ariand E. Colcord, and the writing was executed by E. L. Colcord, as her agent, and under which Hall, the plaintiff below, was placed in possession by them. They subsequently, in the fall of the same year, went to board with Hall, and forcibly expelled him from the premises, to regain which he instituted this action and had judgment in his favor in the Circuit Court.

It is now insisted that, under this writing, Hall was merely the *agent*, and not the *lessee*, of A. E. Colcord, and that his agency might be put an end to at any time, and the possession and use of the land lawfully resumed by her, and that the Circuit Judge erred in instructing the jury otherwise. We do not think so. He was not a mere agent, but, in addition, took an interest in the premises as the lessee of A. E. Colcord, and was entitled to the possession until the 25th of December, 1859. This is too plain for

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argument. We must take the entire instrument together and give effect to all its parts. His agency may very well stand with his interest as lessee.

The judgment of the Circuit Court will be affirméd.

NEIL v. BEAUMONT *et al.*

1. STAY OF EXECUTION. *Entered after two days.* If a party go to the Magistrate's office and enter his name as stayor after the expiration of two days, in the absence of the Magistrate and Plaintiff the subsequent assent of the judgment creditor to the stay of execution, after the lapse of two days and of the justice, to accept the party as stayor, manifested by their acquiescence, is as effectual to bind him as if their previous assent to the act had been expressly given.
2. SAME. *Same. Delivery Bond. Effect of forfeiture of.* If, in such case, the stayor execute a delivery bond and forfeits the same, the effect of the forfeiture is equivalent to a judgment against the stayor, after which he is estopped from gainsaying his original liability.

FROM BEDFORD.

WISENER, for Neil.

ED. COOPER, for Beaumont, *et al.*

McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error seeks to be discharged from liability as stayor of execution, on a judgment obtained by the defendants in error, before a justice, against Thompson and others.

He states in his petition for a certiorari and supersedeas that he went to the office of the justice, at the request of Thompson, after the expiration of the two days allowed by

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law for giving security for the stay of execution ; and the justice being absent, he wrote his name as stayor on the justice's docket, without the knowledge or consent of either the justice, or the plaintiffs in the judgment. He further states in the petition, that after the stay had expired, an execution was issued on the judgment and levied on his property as stayor ; that he entered into bond for the delivery thereof on the day of sale, which was forfeited by the non-delivery of the property ; and that the justice had proceeded to issue another execution, based upon the forfeited bond, which he seeks to have quashed on the ground that he was not legally bound as stayor in the first instance. On motion of the defendants, the Court dismissed the certiorari, and rendered judgment against the petitioner and his surety for the amount of the justice's judgment with twelve and one half per cent interest thereon.

There is no error in the judgment. The subsequent assent of the judgment creditor to the stay of execution, after the lapse of two days, and of the justice to accept the petitioner as stayor—manifested by their acquiescence—was as effectual to bind the stayor, as if their previous consent to the act had been expressly given. But again : the effect of the forfeiture of the delivery bond was equivalent to a judgment against the petitioner : after which—all other questions aside—he is estopped thereby from gainsaying his original liability as stayor.

Judgment affirmed.

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STAY OF EXECUTION. *Effect of. Judgment.* The legal effect of the act of becoming stayor is equivalent to a confession of judgment; it has the force and effect of a judgment against the stayor; and if he acquiesce, and suffer the judgment to remain in force, he cannot in a collateral proceeding in which it is sought to charge him with a legal liability resulting from his relation as stayor, enquire into or impeach the validity of the proceeding or judgment, if it be not absolutely void on its face.

FROM BEDFORD.

Verdict and judgment for the defendant. The plaintiff appealed.

CALDWELL and COOPER, for the plaintiff.

WISENER, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt on simple contract, to recover for money alleged to have been paid by the plaintiff to and for the use of the defendant.

It appears from the record, that on the 1st day of July, 1857, two judgments were recovered against one Thompson, and the plaintiff, as his surety, before G. W. Ruth, a justice of Bedford county, in favor of William Brown, one for \$476 40, and the other for \$476 11, founded upon bills single.

Upon these judgments, executions were stayed by the defendant, at the sole instance of Thompson the principal debtor, as is alledged by the plaintiff. After the expiration of the stay, executions were issued upon said judgments, and the plaintiff was forced to satisfy the full amount of the same.—Thompson having failed shortly before. To recover the amount thus paid, from the defendant as *stayor*, this suit was brought.

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The ground of defence is, that the defendant was not legally responsible as stayor, because the authority given by him to the justice to enter his name as stayor, was not sufficiently descriptive of the judgments. The authority was in writing, and is in the following words, viz :

“ MR. G. W. RUTH, ESQ.”

“Set my name down as stayor to two judgments that William Brown obtained against N. Thompson 3d, and William C. Holt. July 2d, 1857.”

“ J. E. DAVIS.”

The jury were instructed, that the foregoing writing did not communicate authority to the justice to enter the defendant's name as stayor, and that he was not bound thereby ; and, consequently, for that reason, the plaintiff could not recover in the present action.

If the case rested alone upon this point, we should, perhaps, feel constrained to dissent from the conclusion of his honor. The fact is clearly proved that no other judgments were obtained by Brown against Thompson and Holt ; except the two above referred to. In *Barr v. McGregor*, 11 Humpl. 518, it is said, that the written authority to the justice must, upon its face, contain such a reference to and description of the judgment, the execution of which is intended to be stayed, in some one or more particulars, as will render it reasonably certain—without the aid of extrinsic evidence—that the judgment referred to in the authority is the same, for the stay of execution on which, the stayor intended to become bound as surety.

Applying this rule to the present case, can it be said that the written authority given to the justice is insufficient ? It is addressed to the justice, by name, who rendered the judgments : it states correctly the names both of the plaintiff and defendants, and the number of judgments to be stayed ; and it bears date on the day after said judgments were rendered. From these particulars, in the description, is it not made

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"reasonably certain" that the "two judgments" referred to in said writing, are the identical judgments in question? But we need not pursue the discussion of this point farther, as there is another ground upon which we mainly rest the determination of the case.

The legal effect of the act of becoming stayor, is equivalent to a confession of judgment: it has the force and effect of a judgment against the stayor. Admitting, then, for the sake of argument, the entry of the name of the stayor by the justice, to be erroneous: and that it might be avoided by the former, by a proper proceeding directly for that purpose: yet, if he acquiesce, and suffer the judgment to remain in force, can he, in a collateral proceeding like the present, in which it is sought to charge him with a legal liability resulting from his relation as stayor, inquire into, or impeach the validity of the proceeding or judgment, if it be not absolutely void upon its face? We think not.

Can it, then, be successfully maintained, that the justice's proceeding in the present case, is void? Certainly not. All that can be said against it—and we are not to be understood as conceding the correctness of that—is, that the description contained in the written instrument is not sufficiently full or minute: or in other words, that all the evidence required in such cases, was not produced before the justice. But, if this were so, what is the legal consequence? Simply that the judgment is erroneous or voidable: not that it is absolutely void. And if not avoided, it cannot be impeached, when collaterally brought in question.

There is no force in the argument against the correctness of this conclusion, that, in consequence of the original judgment having been satisfied by a prior surety, the stayor cannot now contest the validity of the *stay*, in a direct proceeding. How this may be, is unimportant. If, by his delay, the stayor has lost his remedy, it is his misfortune; but this consideration does not affect the question in this case.

The right of the plaintiff to maintain this action, if the de-

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fendant were liable as stayor, is not denied, and has been recognized in several of our own cases. See *Winchester v. Beardin*, 10 Hump. 247. *Chaffin v. Campbell*, 4 Sneed, 184. Judgment reversed.

WILLIAM BATES v. H. H. SULLIVAN and WIFE.

Costs. *Slander. Code*, § § 8198, 3402. Section 3402 of the Code governs the taxation of costs in actions for slander ; and if the verdict is under five dollars the plaintiff shall recover no more costs than damages: If five dollars the plaintiff recovers full costs.

FROM DEKALB.

This cause was tried before Judge DAVIDSON who was presiding by interchange with Judge FITE.

M. M. BRIEN, for Bates.

R. CANTRELL, for Sullivan and Wife.

CARUTHERS, J., delivered the opinion of the Court.

In this action of slander, the plaintiff recovered five dollars damages, for which the judgment of the court was rendered against the defendants, *together with all the costs, amounting to about three hundred and twenty-four dollars.*

The only question made in the case is as to the correctness of the judgment for the costs. The defendants insist that no more cost than damages can be recovered against them.

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The case depends upon the construction of two conflicting sections of the Code.

Section 3198 under the head of "Costs in Civil Actions" provides, "that in all civil actions founded upon assaults, assaults and battery, malicious prosecution, false imprisonment, *slanderous words*," &c., "the plaintiff recovers no more costs than damages, unless the recovery *exceed* five dollars."

Section 3402, under the head of "*Slander and Libel*," provides, that, "where the verdict in slander is *under* five dollars, the plaintiff shall recover no more costs than damages."

If the first section governs the case the judgment for all the costs is wrong, because the damages do not *exceed* five dollars, but it is right if the last section applies, because the damages given is not *under* five dollars.

The successful party is entitled to full costs unless the case falls under some exception ; Code, 3197. This case is not excepted unless it is embraced by sec. 3198.

By inadvertance on the part of the Revisors and the Legislature, this conflict, with some others, are found to exist in the Code. Nothing less could be expected in a work so great and complicated. They have, and must produce a good deal of perplexity and trouble to the courts, whose duty it is to administer the law, as questions may arise upon it. We must ascertain the intention of the Legislature by the best light we have, and the established rules of construction.

One general rule, is, that in doubtful cases, it will be presumed that it was not intended to change but only to revise or compile the old statutes.

As far back as 1715, ch. 27, Car. and Nich. 188, the words of sec. 3402, were employed in relation to actions of slander. In 1829, ch. 1, Car. and Nich. 190, the words of the other section of the Code are used in reference to all the other actions embraced therein, except slander. So, the first section is in conformity with the old law in requiring the damages to *exceed* five dollars, in assaults and battery, false imprisonment, &c., and the last section in like manner conforms to the existing law in relation to slander in the other provision. In

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addition to this argument, it might be remarked that the mere fact that the provision as to slander stands alone, and under that distinct head in sec. 3402, is entitled to some weight in the construction.

According to this view the judgment of the Court for all the costs against the defendants was right, and we discharge the supersedeas, dismiss the writ of error, and enter judgment here for all the costs not paid, against the original defendants and their sureties for the writs of error and supersedeas.

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THE BANK OF TENNESSEE v. C. L. NELSON *et al.*

1. WILL. *Who may contest.* If a will has been proved in a court having Jurisdiction of the probate of wills, none but persons having an interest in the estate of the testator, as heirs or distributees, can contest the validity of the same either in a direct or collateral proceeding.
2. SAME. *Same. Case in judgment.* Nelson made his will devising his real and personal estate to his wife for life, with remainder to his children. The devisees were witnesses to the will. A creditor of one of the devisees filed a bill and attached his interest in the estate, and sought to set aside the will upon the ground that it was inoperative to pass the real estate, because of the incompetency of the witnesses. Held: that the creditor can only recover in right of his debtor who is content with the will; and, having no interest in the estate as heir or distributee, cannot contest the will.

FROM RUTHERFORD.

Decree for the complainant before Chancellor RIDLEY.
The defendants appealed.

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GANT and KEEBLE, for the complainant.

PALMER and COOPER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

The Bank recovered three judgments against C. L. Nelson in 1854, amounting to between seven and eight thousand dollars, upon which executions were issued and returned "no property found." Matthew Nelson, the father of Charles L., died in 1856, leaving a will in which he devised and bequeathed all his land, slaves, and other property to his widow for life, and then to his children, including the said Charles. The original bill was filed 1st January, 1857, to subject the remainder of Charles to the payment of these judgments, and in the mean time to enjoin him from disposing of the same. Injunctions and attachments were issued. On the 27th of April, 1858, an amended bill was filed alleging that the said will was a nullity as to the land because it was attested and proved by two or more of the sons, who were interested under it, in the remainder of the property, real and personal, as aforesaid, and claiming that the land descended to the heirs, and that the interest of their debtor should be made liable to the judgments of complainant. The will was proved in common form at the November term, 1856, of Rutherford County Court, by the said attesting witnesses, without opposition. They charge that the will, though void for want of proper attestation, constitutes a cloud upon the title, so that the interest of their debtor would not sell for its value, and ask that the cloud be removed, by declaring that the will is void, or that an issue of *devisavit vel non* be ordered, to be tried at law, to test the validity of the paper. In the event that the will is sustained, they pray for a decree to sell the remainder interest of their debtor to satisfy their judgments.

The fact that the witnesses to the will were devisees and legatees under it, was admitted. Whereupon the court held that upon the suggestion of fraud or irregularity in the exe-

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cution or attestation under the act of 1784, the original paper should be produced, and took jurisdiction to declare it invalid on that ground, and did so decree, as to the realty, though good as to the personalty; and declared that the present interest of Charles to the land as heir, and his remainder in the personalty should be sold for the debts of complainant. From this decree defendants appealed.

The 6th sec. of the act of October, 1784, ch. 10, Code, secs. 2198-9, makes attested copies of wills admitted to probate, equal evidence to the originals, but provides that if fraud in "drawing or obtaining," or "any irregularity in the executing or attestation," is "suggested," the original shall be produced. What effect this is to have is not well defined, and as this case, in our view, does not require an exposition, it will not be attempted, but left for a case that necessarily raises the question, when more consideration may be given to it. It is insisted for complainants that under that proviso, power may be exercised by a Chancellor, to disregard the probate, and without ordering an issue to try the validity of the will, or suspending his action until the same may be done by a proper proceeding in the County or Circuit Courts, for a re-probate in solemn form, determine the question of the validity of the will, on the ground that the witnesses to it, and by whom it was proved in common form, were not such as are required by the 11th section of the act of April, 1784, ch. 22, to make a "good and sufficient" will for lands. The position assumed is that when the "suggestion" referred to by the proviso is made, no rights, as to realty, can be successfully asserted under the will without proving it by legal witnesses on the trial, as at common law. The Chancellor assumed this jurisdiction and declared the will void, as to the land, because the attesting witnesses were not such as are required by the said act, but were "interested in the devises" of the will. On the other hand it is insisted that he had no such jurisdiction, but that the probate in the County Court, having general and exclusive jurisdiction on the subject, was binding upon everybody until revoked by

calling for a re-probate, and the trial of an issue of *devise-vit vel non* in the Circuit Court. But as we have said, those questions need not now be decided as this case can be disposed of upon other grounds.

We think the complainant does not occupy a position to question the validity of the probate, on the ground assumed. The will has been proved in a court of general jurisdiction of those subjects. No one, without an interest in the estate can contest a will or call for a re-probate. The complainant is only a creditor of one of the devisees, and can only act upon his rights. The debtor is content with the will, chooses to avail himself of no objection to it that may exist, although it reduces a fee in the land to which he would be entitled by law, to a remainder interest. If he acquiesces in its validity by waiving his right to object and contest it, for the incompetency of attesting witnesses, or on any other ground, how can his creditor, who has to pass through him, to reach the property, make the objection for him? But this case is still stronger. Before the filing of this bill, and previous to the probate, this defendant, with the other devisees, eleven in number, being aware of the difficulty which existed in relation to the attesting witnesses, entered into a written agreement, binding themselves to abide by the provisions of the will, and permit it to go to probate, without objections. This course seems to have been the result of an honest and laudable desire on their part, to carry out, and not frustrate, the deliberate and dying wishes and purposes of their father, by waiving the advantages the law would give them by an opposite course. It was the surrender of a present for a future interest, for the benefit of their mother. Now, upon what principle can a creditor of any one of the devisees and legatees, disregard and set aside this arrangement? We think it clear that it cannot be done; and that, so far as the complainants are concerned at all events, the will is to be taken as well proved and valid, both as to the realty and personalty. Yet by the will the debtor has a vested remainder in the land and slaves, and that is attached in this bill. There is no

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doubt but that a vested remainder in land may be sold for debt, even by an execution at law, but that the law is otherwise in the case of slaves, was held in *Allen v. Scurry*, 1 Yerg., 36, and that decision has never been disturbed, but is re-affirmed in *Lockwood v. Nye*, 2 Swan, 518. But in this last case, the law is laid down differently as to the power of a court of equity, to decree a sale of a remainder in slaves for the debts of the remainder man under attachment bills, and we adhere to that case, and approve of the reasons upon which it is sustained. All that a man has should in some form be subject to his debts, more especially since all proceedings against his body have been refused by the mild and humane policy of our law. It follows from this conclusion that the complainants are entitled to a decree to sell the remainder interest of the debtor, both in the land and slaves, for the satisfaction of their judgments against him. The purchaser will take all the rights of Charles L. Nelson, under the will, and no more.

The decree of the Chancellor will be so modified as to conform to this opinion. The costs here and below will be paid out of the proceeds of the sale.

WASHBURN v. THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

1. RAILROAD COMPANY. *Acts through its officers and agents.* A railroad company acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation.
2. SAME. *Same. Power of a Superintendent.* If the Superintendent of a railroad company be clothed with the power and authority of the Board of Directors, so far as regards the control and management of the trains; and all the arrangements connected therewith: he is the

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immediate representative of the company—the corporate execution officer—and the company is liable for an injury resulting from the negligence or improper order of the Superintendant, just as much as if it had emanated directly from an act of the company in its corporate capacity.

3. **SAME.** *Servants of. Liability for injuries to, when not in the employ of the company.* The rule that the principal is not liable for an injury to one servant, resulting from the negligence or improper conduct of another servant, does not apply where the servant injured was not at the time of the injury acting in the service of the master. In such case the servant injured is substantially a stranger and entitled to all the privileges he would have had if he had not been a servant.
4. **SAME.** *Same. Same. Servant absent without leave.* If the servant is improperly absent without leave, but is received on another train of the company than the one to which he belongs without objection by the conductor, who is intrusted with the duty of excluding all persons not lawfully entitled to be on the train, the liability of the company is not affected thereby.
5. **SAME.** *Same. Riding free and in the baggage car.* The fact that the servant or other person, is riding in the baggage car, with the knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car.
6. **SAME.** *Same. Question reserved.* Is the principle that the master is not liable for an injury received by one servant from the negligence of another, while both are acting in the common business of the same master, applicable to servants of a railroad company, in different grades; when they are subordinate the one to the other; or not in the same employment?

FROM DAVIDSON.

Verdict for the defendant, BAXTER, J., presiding. The plaintiff appealed.

FOSTER and McEWEN, for the plaintiff.

EWING and REID, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

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The plaintiff brought this action against the company to recover damages for an injury to his person, occasioned by a collision between two trains, on the defendant's road. Under the instructions of the court, the jury found against the plaintiff.

It appears that about the 8th of December, 1857, a bridge on the road, and perhaps a hundred yards of the track, were swept off by a flood, so that the trains were hindered from passing between Nashville and Chattanooga for some days otherwise than by keeping a train on each side of the breach in the road, and changing the passengers and baggage from one train to the other.

On the morning of the 14th of December, before the breach had been repaired, the Superintendent of the road directed Chilcutt, an engineer in the employ of the company, to leave Nashville with his train at the hour of 5 o'clock A. M., the schedule time of departure being 2½ o'clock, P. M. The Superintendent informed the engineer that he would find a train in readiness on the other side of the breach in the road, and directed him to transfer his passengers and baggage to that train, and to go through to Chattanooga, stating that there would be no train from the latter place to Nashville that day. The agent of the company at Chattanooga, in ignorance of the order of the Superintendent, started a train from the latter place on the same morning, and on a curve in the road, the trains came in collision, whereby the plaintiff received a serious injury.

The telegraph wires were broken, so that no communication could be made in that way. The respective conductors of the trains being entirely ignorant of the orders given at the opposite ends of the road, and neither having the least expectation of meeting a train, omitted the usual precautions to prevent a collision, when running out of time. The proof shows that the train from Chattanooga was running on schedule time, but the other train was not.

It appears that the plaintiff was an engineer in the employ of the company. His train was lying idle at Chatta-

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nooga, on account of the breach in the road ; and on the day preceding the collision, he got upon another train to go to Nashville, on a private errand of his own, without permission, as it would seem, from the proper agent of the company.

Chilcutt states that on his way to Chattanooga, on the day of the collision, the plaintiff got upon his train at Decherd's Station, a point between Nashville and the break in the road—and took his seat in the baggage car, the place where those who "ride free" should sit, and where he was sitting when the collision took place.

The proof shows that the Superintendent had the entire management and control of the "rolling stock" of the road ; that he always sent out and received the trains ; and also had the control and management of the conductors, engineers, brakemen, and all other employees of the road, all of whom were bound to obey his orders, "according to the rules of the road."

The court instructed the jury, in substance, that the Superintendent of the road and the plaintiff were both servants of the company ; and that for an injury to the plaintiff, by the negligence or misconduct of the Superintendent, he could maintain no action against the company, if there were no fault or negligence on the part of the latter. That it made no difference that the one servant was higher in authority than the other, or that they belonged to different departments of the service. Nor did it make any difference that the plaintiff was not actually employed in the service of the company on the day the injury was received, unless he had abandoned the service of the company with the view of dissolving the relation of servant. The court further stated, in effect, that the Board of Directors of the company, was to be regarded as the *principal* ; and that an employee of the Board, though styled President or Superintendent, could not be so considered.

These instructions in reference to the facts of the case, are incorrect, we think, in several particulars.

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The principle that the master is not liable for an injury received by one servant from the negligence of another, while both are acting in the common business of the same master—as applied to railway companies—is comparatively a new one everywhere, but especially in our courts. It is a principle of great practical importance, and care must be taken that it be not applied to cases not clearly falling within it. In some of its incidents it can scarcely be considered as yet fully settled. Whether the rule be applicable to servants in different grades, or where they are subordinate the one to the other, or not, in the same employment, are questions upon which there is some conflict of opinion in the American cases. In most of the cases, however, it seems to be thought that such a distinction is not maintainable; and that it is sufficient that both servants were engaged in the same general business.

In the view we have taken of the present case it is, perhaps, not necessary that we should very minutely consider to what extent the application of the rule may be varied or modified by the different circumstances of particular cases. We must be careful, however, that such a latitude be not given to the rule as would enable the corporation to evade liability in all cases, by entrenching itself behind its officers and agents.

In the view of the Circuit Judge, the Superintendent of a railway company stands upon exactly the same footing, as respects the applicability of this rule, with any other employee, however subordinate his position; and so of the President; and that the board of directors only, in view of the rule, is to be regarded as the principal, or master. Upon this question we have been referred to no authority exactly in point.

If this be correct, it will inevitably follow, that the company cannot be held liable, in a case like the present, unless it can be shown that the injury resulted from the direct action of the company, in its corporate capacity. This is absurd. The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter.

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it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation. It must act in this mode, or not act at all.

The Superintendent may be said to be, as respects this particular company, from the power shown to have been given him by the Board, the immediate representative of the company—the corporate executive officer—intrusted, for the time, with the power and authority of the board of directors, so far as regards the control and management of the trains, and all the arrangements connected therewith.

In this view, the company must be held liable for an injury resulting from the negligence, or improper order of the Superintendent, just as much as if it had emanated directly from an act of the company in its corporate capacity.

The matter of fact, that it was culpable negligence in the Superintendent to start a train from Nashville, out of time, without any precaution whatever to avoid a collision with a train coming in the opposite direction, is not denied.

But the instructions are erroneous in another respect. The principle stated above, does not apply “where the servant injured was not, at the time of the injury, acting in the service of the master. In such case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant.” 6 Eng. R. cases, 580. Cited in 1 Am. R. cases, 568, in note.

The plaintiff, in the present case, may have been blamable for leaving his post of service, without permission from the proper source; how that fact is, does not satisfactorily appear. But, admitting he was improperly absent without leave, still he was received on another train of the company without objection by the conductor—who was intrusted with the duty of excluding all persons not lawfully entitled to be on the train. And whatever may have been the exact relation of the plaintiff to the company, under these circumstances, it certainly cannot be said, in the sense of the rule, or in any proper sense, that he was *then* acting in the service of the company. The fact that his absence from duty, without per-

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mission, may have made him liable to an action, by the company, does not affect the question before us.

For the foregoing reasons, we think the rule is not applicable to this case.

The fact that the plaintiff was riding in the baggage car does not affect the case: though, from the proof, that was the proper place for him to be, under the circumstances.

It is laid down in Redfield on R. 331-2, that "one being in the baggage car, with the knowledge of the conductor, will not preclude him from a recovery for an injury caused by a collision, even though he might, or would not have been injured if he had remained in the passenger car." 14 Howard, (U. S.) 468.

Nor does it affect the question, that the plaintiff, at the time of the injury, was "riding free." The same author lays it down, that "the liabilities of the company attach, although the passenger were riding upon a free ticket." Redfield on R., 328, and note. See also, 14 Howard (U. S.) R., 468.

Upon the whole case, we think the judgment is erroneous and it will be reversed.

STATE OF TENNESSEE v. FRANCIS STRICKLAND.

CONTRACT. *When implied. Agent.* William Strickland was employed as Architect of the State Capitol and employed his son, Francis, as assistant Architect. He was not authorized by the Commissioners to employ an assistant; and as no contract was entered into between the Commissioners and Francis Strickland, or by William Strickland and him, by their authority; and, as under the facts proven, none can be

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implied by law, the said Francis is not entitled to recover compensation from the State.

FROM DAVIDSON.

Verdict for the plaintiff, Baxter, J., presiding. The State appealed.

HEAD, Attorney General, for the State.

NEIL S. BROWN and ANDREW EWING, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt, under the statute, brought by Strickland against the State, for the recovery of \$5,000 00, for services alleged to have been rendered, during the period of five years, as assistant architect of the State Capitol at Nashville.

Verdict and judgment were for the plaintiff for fifteen hundred dollars.

It is insisted on behalf of the State, that the judgment is erroneous, on two grounds : First, that the verdict is wholly unsupported by the evidence ; and secondly, that the charge of the court is erroneous. We fully concur with the Attorney General upon both points.

The proof as presented in this record, not only fails to make out a case for a recovery in favor of the plaintiff ; but clearly establishes, as it seems to us, that the claim set up against the State is destitute of any just foundation.

It is assumed for the plaintiff, that William Strickland, his father—who was the architect of the Capitol—had authority from the commissioners, by implication at least, to employ an assistant architect ; and that he accordingly did employ the plaintiff as such. In support of this, the following paper was offered in evidence : “Nashville, November 1st, 1848. Agreement made this day between William Strickland, archi-

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tect of the State Capitol, and Francis W. Strickland : that *he* is to assist *him* in every way that he may direct, at the building, and that he is to receive for his services \$80 a month."

The proof shows, that the plaintiff rendered services, in making drawings and otherwise, in his father's office and about the building up to the time of his father's death. There is no proof, on the part of the plaintiff, that William Strickland had any authority to employ an assistant, or that, in fact, he ever did so. There is evidence that he made contracts with some of the laborers and mechanics about the building, which were ratified by the commissioners. The authority of William Strickland to employ, and the fact of his employment of the plaintiff, are attempted to be made out merely by inference or presumption.

On the other side, it is proved that on the 18th of June, 1845, the Commissioners appointed to superintend the construction of the building, employed William Strickland as Architect, at a salary of \$2,500, per annum ; and that he remained in service in that capacity to the time of his death in 1854. By the written agreement, he undertook to "prepare and furnish drawings of the plans, elevations and sections for the State House. * * to superintend and direct all the artisans, mechanics and laborers, that may from time to time be employed by order of, or under the directions of the 'Commissioners,' in and about the construction of said building : to select and judge of all the materials that may be required for said work : and, if required by the 'Commissioners,' to make contracts for materials for the execution of said work : and, generally, during the progress of the work, to give his personal attention and supervision, both as to the preparation of materials, and putting the same together, so that the building shall progress with all reasonable rapidity," &c.

Bass and Morgan, the surviving Commissioners, were examined on the trial. They distinctly prove, that the plaintiff never was employed by the Commissioners ; nor was William Strickland ever authorized by them to employ him : nor did

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William Strickland ever suggest to them, that he was unable himself to carry out his contract : and that they never gave him any authority to make contracts, though they recognized some that he made.

Bass, who was Chairman of the Board, further states, that he frequently saw the plaintiff—who was a young man of about 24 years of age, just from Philadelphia—frequently about the Capitol, making drawings ; but never heard of his making any claim for his services as assistant architect, until the 3d of January, 1852, when the plaintiff brought to him, from his father, the following paper :

“W. Strickland’s respects to Mr. Bass, and requests that he will be good enough to allow his son Francis some compensation for the many services he has done in drafting, and attention at the building of the State Capitol for several years past. William Strickland has allowed him for his assistance, one dollar per pay for the last two years, and thinks that the commissioners should grant him the like sum per day.” ‘Nashville, 3d January, 1852.”

The production of this paper by the commissioners, was a fortunate thing for the State, and for the apparent truth of the case, but very unfortunate for the plaintiff’s claim. It was written by the father, and handed by the son, to Mr. Bass, more than three years after the date of the pretended written contract, above set forth, by which, as it is now insisted, the son was employed on behalf of the State as an assistant of his father, at the rate of \$80 per month. It was omitted in the argument to show how these two papers could stand together, and we have been unable to perceive it for ourselves. But this is not all : Bass states that the claim of the plaintiff never was presented to the Board for allowance. Morgan states that this claim was presented to the Legislature at two different sessions—1855 and 1857, and it was rejected on both occasions.

He further states that William Strickland was intemperate the last five years of his life ; but he heard no complaint of his inability to perform the duties of architect : that he fre

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quently saw the plaintiff in his father's office, and supposed he was helping his father, or learning the science of architecture ; but never heard of plaintiff's claim for services until 1855, when he was called on to give a statement before a committee of the Legislature.

From this outline of the material facts of the case, it is manifest, that no *contract* ever existed between the plaintiff and the commissioners ; and it is equally clear that none can be implied by law. The latter assumption is conclusively repelled by the testimony. The proof of the commissioners establishes that William Strickland had no authority whatever to employ the plaintiff : and the note to Bass of the 3d of January, 1852, demonstrates the fact that he really never did do so. That note concedes that the plaintiff had no legal claim on the commissioners, and asks compensation as a pure matter of favor : It concedes, too, that the plaintiff, if employed at all, was not in the employ of the commissioners, but in the employ of his father alone, at one dollar per day. This conclusion is still more strongly fortified, by the omission of the plaintiff to make any such demand upon the commissioners ; and the repeated appeals made by him to the bounty of the Legislature. These facts, and this course of conduct on the part of the plaintiff, are utterly irreconcilable with the assumption of any just claim upon the commissioners, based upon a contract either express or implied.

In this view of the facts of the case, it can be assumed as a conclusion of law, that the present action cannot be maintained : and so we hold.

This renders it unnecessary to notice the charge of the court, which, in several respects, we think is erroneous.

Judgment reversed.

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 JOHN W. MARTIN v. C. W. NANCE *et al.*

1. **LAND LAW. Boundary. Navigable Streams.** The owners of land upon navigable streams, have title to ordinary low water mark ; and to the centre of streams not navigable ; even when the title papers call for a corner on the bank, above low water mark, unless it is shown that a line was run and marked on the bank as the true boundary.
2. **SAME. Same.** To control the description of land in a deed or grant it must be shown that monuments of boundary were made *at the time* of the execution of the deed or grant.
3. **NEW TRIAL. Cumulative Evidence.** A new trial will not be granted upon the affidavit of a witness who was examined in the cause in which he shows he will greatly strengthen his testimony. It would show negligence on the part of the party introducing him ; and, if touching matters about which he testified, would be cumulative.
4. **PRACTICE AND PLEADING. Demurrer. Code, § 3250.** Section 3250 of the Code, which provides, in actions of ejectment, that the judgment for the plaintiff, is, that he recover the premises according to the verdict, or, if by default or on demurrer, according to the description in the declaration, does not preclude a party from pleading upon overruling his demurrer ; but simply provides for cases where the defendant fails to make any further defence.

 FROM DAVIDSON.

This cause was tried at the May Term, 1859, before his Honor, Judge BAXTER. Verdict and judgment for the plaintiff.

No counsel appeared.

CARUTHERS, J., delivered the opinion of the Court.

Ejectment for about 23 acres of land on the shore of Cumberland river, a few miles below Nashville. The plaintiff claims title by grant from the State in 1857, on entries made just before that time. He insists that the land entered by him was vacant at the time. It embraces a bar, or strip of land between the top of the bank, and low water mark. The defendants insist that the State had parted with the land by

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grant to James Bosley in 1787, and that the title is therefore outstanding. The river line of that grant is thus discribed ; "thence north 270 poles, to a sycamore on the bank of Cumberland river, thence down said river according to its several courses, 195 poles, to a large sweetgum."

The court charged that these calls would carry the title to low water mark, and thus cover the land entered by the plaintiff, although the trees called for were upon the bank, eleven poles from low water mark, unless it were shown that a line was run and marked upon the bank at the date of the grant. In other words, that the law would presume upon these calls that the true line was at low water, unless it were proved that it was actually run and claimed at a different place.

The case of *Elder v. Burrus*, 6 Hump., 364, following the North Carolina case of *Wilson v. Forbes*, 2 Dev., 36, settles the law of this State to be, that the owners of land upon navigable streams have title to ordinary low water mark ; but if not navigable, to the centre. So, in this case, the title of Bosley and those claiming under him, would extend to the river at the ordinary low water mark, and run with that from the sycamore to the gum, and consequently, leave no vacant land. It would be otherwise, as the court charged, if it were proved that a line had been run and marked from the one corner to the other on the bank at the time of the grant. This was a question for the jury, and they have decided against it. There was some evidence of old marks upon the bank, but it seems to have been regarded by the jury, insufficient to establish the line. The case of *Massengill v. Boyles*, 4 Hump., 207, holds, that to control the description of land in a deed or grant, it must be shown that monuments of boundary were made at the time of the execution of the deed or grant. The evidence of Hagans, the surveyor, certainly fell short of that, in this case. He only proved that there were old marks on the bank, without fixing their age with any precision. There was no other proof on that point.

On the motion for a new trial, the affidavit of the same

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witness was read, in which the case is made much stronger for the antiquity of the marks on the bank. But this comes too late, as he had been examined as a witness on the trial; and it is against all proper practice to grant a new trial to allow him to strengthen his evidence. He states that since the verdict of the jury he has cut blocks out of the marked trees on the bank, about which he spoke in his examination, and finds that they were marked at least seventy years ago. This would have been an important fact for the jury, but it was negligence on the part of the plaintiff, not to have been prepared with it on the trial. And it was only cumulative, at most. There is no precedent for granting a new trial upon such a ground.

There was no error in the action of the court allowing the defendants to plead after overruling their demurrer. It is true, that section 3250 of the Code, provides that "the judgment for the plaintiff, is, that he recover the premises according to the verdict, or, if by default, *or on demurrer*, according to the description in the declaration." But this only means, where the case goes off finally upon the overruling of the demurrer, on failure to make any further defence as the defendant *may do as "a matter of right,"* under section 2936.

The question made in relation to the reading of the charter of the "Buena Vista Turnpike and Ferry Company," need not be considered, as it cannot affect the case, the defence being perfect against the plaintiff, on the ground of an outstanding better title. The said company are only interested to the extent of the easement of their road and ferry landing, upon the disputed territory. This is granted to them by their charter, and would be good, no matter in whom the title may be. But the plaintiff whose title fails upon other grounds, has nothing to do with that question, and if an error was committed, he is not injured by it.

The judgment will be affirmed.

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JOHN B. HAWKINS *et al.* v. JAS. A. ENGLAND *et al.*

1. **SALE OF REAL ESTATE.** *Will. Code*, § 3340. A will, which devises land to certain parties and directs that the same be equally *divided* between them, does not fall within the prohibition of sec. 3340 of the Code, which enacts that "in no case shall property be sold, if it be claimed under a will which expressly directs otherwise."
2. **SAME.** *Purchase by guardian. Code*, § 3339. *Question reserved.* Does sec. 3339 of the Code apply to any other sales of real estate than those made under the chapter containing said section; and would a guardian be prohibited from purchasing at sales made for partition?

FROM FRANKLIN.

At the July term, 1859, his Honor, Judge MARCHBANKS' sustained the third exception to the report, and ordered the re-sale of the land.

P. TURNEY, for the complainants.

A. S. COLYAR, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This is a proceeding for the sale of land *for partition*, in which several questions are made for the reversal of the decree arising out of the following state of facts:

Joseph Miller made his will in October, 1852, and died in Franklin county, in 1858. The *seventh* and residuary clause is;

"As to the rest and residue of my estate, both real and personal, money in hand and choses in action, after paying and discharging the legacies herein bequeathed, I desire and direct that the same be equally *divided* among my children, to-wit: Samuel Miller's heirs, Susannah Perkins, Jane Hawkins, wife of Squire B. Hawkins, share and share alike."

The real estate conveyed by this clause was 370 acres of

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land, being that part of the tract on which the testator lived, after taking off 227 for his wife during her life, or widowhood. This last, on the happening of either of those events, is devised with all the personal property given to her, to all his children equally. His children, with the representatives of those who are dead, are ten in number. This petition for the sale of the realty was filed by and against all, and asked for the sale of the remainder in the dower, in which all were interested, as well as the 370 acres embraced in the residuary clause.

The Circuit Judge at the July term, 1858, directed a report to be made upon proof, by the Master, as to the propriety of selling, &c. This was done at November term, 1858, and the court being satisfied that a case was made under the law for a sale, ordered the same to be made by the Master, of the 370 acres, but not the remainder in the dower tract. Whereupon John Miller, one of the petitioners, who was interested in the dower tract, but not the 370 acres decreed to be sold, filed his petition to arrest the proceedings, upon the ground that he had discovered that the will contemplated a partition of the land, and by implication forbid a sale, and therefore, that, according to the Code, sec. 3340, the same could not be sold for partition. The court refused to supersede the previous order, and the land was sold, and James A. England, who had married the daughter of Sam'l Miller, dec'd, one of the devisees, and who was one of the defendants, as well for himself and wife, as her infant brother, Samuel Miller, jr., as his general guardian, became the purchaser at \$35.36. The value of the land, as fixed by the proof, was but \$18 per acre. This was unquestionably a fair and high price. There is no doubt but that it is most clearly to the interest of all concerned, and particularly to the minor, that the sale should stand. And all the parties interested in the matter are in favor of it. But the same John Miller, who has no interest at all in the case, since the dower tract was reserved from sale, filed three exceptions to the report of sale.

1. Because there is no authority to sell under the will.

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2. The heirs of Joseph Miller are not properly before the court.

3. The purchaser is the guardian of the minor defendant.

The court overruled the two first exceptions, but sustained the third, and ordered a re-sale. From this John Miller, and no other party, appealed to this Court.

In ordering the land to be sold, and overruling the first exception, which involves the same question, we think his Honor was correct. Section 3340 of the Code, which it is supposed forbids the sale in this case, we think, does not apply. It provides that, "In no case shall property be sold, if it be claimed under a will which expressly directs otherwise."

This will does not "*expressly* direct otherwise." It directs that an equal *division* shall be made of the property embraced by the residuary clause among his children therein named. But he certainly does not expressly, nor, as we think, impliedly forbid that this may be done by a sale, if the interest of the devisees would be best promoted by that course.

In sustaining the third exception and setting aside the sale, we suppose his Honor considered that section 3339 of the Code applied to the case. That prohibits a guardian, next friend, or witness, to purchase property sold under a decree in the cases to which it refers. As the purchaser does not appeal, perhaps that question is not properly before us. We are not prepared to concede that this question applies to any other sales than those made under the chapter in which it is found, and if so, it would not prohibit a guardian, &c., from purchasing in sales made under the preceding chapter, for partition, as was the present case. Previous to the Code, we have held that a guardian may purchase, provided it is found by the court to have been fairly done, and subject to no exceptions, upon scrupulous and jealous examination. *Elder v. Lancaster*, decided at the last term at Jackson. We think that the Code only changes this rule as to cases provided for in chapter 3, page 617. But as there is no appeal by either

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party interested in that part of the decree, we cannot change it.

We affirm the decree and remand the cause to be proceeded in by a re-sale, at which the guardian may bid for the land. John Miller will pay the costs in this Court, and the cost of his petition, and the previous sale below.

ROBERT NICKSON v. JAS. R. TONEY *et al.*

1. **MORTGAGE.** *Sale with right to re purchase.* At a Clerk and Master's sale, to pay debts, the relation of mortgagor and mortgagee may be created by an agreement at the time of the sale, or anterior thereto, that the creditor should become purchaser, and hold the property as security for the debt. And at the same time, the right to re-purchase, instead of a mortgage, if the parties so intend, may be retained by stipulation.
2. **SAME.** *Same. Proof must be clear. Parol evidence.* To establish either the one or the other, by parol evidence, in the face of a decree and absolute purchase, the proof must be cogent and clear.
3. **SAME.** *Same. Voluntary promise. Consideration.* A mere voluntary promise made by the creditor *after* the sale and purchase, and not contemporaneous with, or anterior to it, nor based upon some new and solid consideration, cannot clothe the debtor with any title.

FROM SMITH.

Decree pronounced by Chancellor RIDLEY. The complainant appealed.

W. H. DEWITT, for the complainant.

ANDREW McLAIN, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

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The complainant was the owner of an interest in remainder in the personal estate of his father, Charles Nickson who died in the year 1835, and who, by his will, devised his estate to his wife for life, with remainder to his children. The defendant, James R. Toney, being a creditor of complainant, filed a bill in the chancery court at Carthage; and at the February term, 1843, of that court, succeeded in getting a decree to sell complainant's share in the personal estate aforesaid, for the payment of what was due him. The same was duly sold by the clerk and master, and purchased by Toney, at the price of \$310.00; and at the August term of the court, in the year 1843, the sale was confirmed, and, by decree, the title to the share was divested out of complainant and vested in Toney. In December, 1857, the widow of the testator—the tenant for life—died, and William Nickson, the surviving executor, filed a bill for a division of the estate; and in the report of the commissioners, which does not appear yet to have been confirmed, two slaves, Winnie and Betty, of the value, respectively of \$900.00 and \$416.00, were allotted to Toney, as the share of complainant in the personal estate. This report was made to the August term, 1858, of the chancery court. Betty has since died, and Winnie has had a child.

The complainant filed this bill, on the 10th of August, 1858, to recover of Toney the said slaves, upon paying him the \$310.00 and interest. He does not question the regularity or legality of the decree, or sale under it; nor does he distinctly state that the purchase made by Toney was intended as a mortgage. The ground of recovery stated is, that previous to the filing of the bill by Toney, and while the same was pending, and before his purchase of the share of complainant, he agreed with complainant that he would purchase in said share, and that complainant might, at any time, have it back, by paying to him the purchase money and interest; that there was no time fixed for the payment; and that, because of this agreement, he did not defend the suit; that Toney has ever since recognized his right to have the

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share upon the terms stated, until about the time of the division, when he set up an absolute title, unless complainant would make him the further payment of a demand, which he considered unjust. The complainant made a tender of the \$310.00 and interest.

The defendant, Toney, in his answer denies, positively, any such agreement, either *prior to the filing of the bill, during its pendency, or before the sale and purchase by him*; but admits that *after* he had made the purchase, and before he left the place of sale, complainant, his mother, and brother, who were present and were his friends, being distressed at the loss of the share by complainant, he did agree that if complainant would repay him the purchase money and interest, and any debts he might owe him, he should have the share back; that this was merely gratuitous and done of kind feelings to the family, and in no way binding on him; but which he was willing, and offered repeatedly, to carry out; that though no time was fixed for the payment, yet he did not expect complainant to delay it fifteen years; that having fallen in debt to him in the sum of \$200.00, for a horse, complainant had ungratefully refused to pay this debt, and had, in other respects, annoyed him until he felt justified to insist, as he did, upon his absolute title to said share.

The Chancellor refused the complainant any relief. In this opinion we concur. It is not to be questioned that, at a clerk and master's sale to pay debts, the relation of mortgagor and mortgagee may be created by an arrangement at the time of the sale, or anterior thereto, that the creditor should become purchaser and hold the property as security for the debt. And at the same time, the right of re-purchase, instead of the mortgage, if the parties so intend, may be retained, by stipulation. But to establish either the one or the other, by parol evidence, as is attempted here, in the face of the decree and absolute purchase by Toney, it has always been held that the proof must be cogent and clear. *Lane v. Dickerson*, 16 Yer., 373-6; *Loyd v. Currin*, 3 Hum., 462-4. Here the proof, to our mind, entirely fails to make out any

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such agreement. It will not be insisted that a mere voluntary promise, made *after* the sale and purchase, by the defendant, can give the complainant any title. The answer so states the promise, and the conduct of the defendant, and the proof, are consistent with it. It matters not how often the defendant was willing to let complainant have the shares, unless the agreement were contemporaneous with, or anterior to the sale, or based upon some new and valid consideration, it could have no effect towards clothing complainant with any title. *McDonald et al. v. McLeod*, 1 Ird. Eq., 221-8. Here it is not pretended that the debt of Toney, established in the decree, was unjust; that any unconscientious advantage was taken of complainant; that the share sold for less than its then value, or that there was any inadequacy in the transaction. Indeed, the case is without allegation or proof on this subject. Neither is it alleged, or pretended, that fair competition was prevented, or the right of complainant in any way sacrificed. The relief is asked solely upon the ground of the agreement *at* and *before* the sale. But the proof fails to establish it, and the relief must fail with it.

The decree of the chancellor will be affirmed.

DAVID P. BYRN v. FLEMING *et al.*

1. WILL. *Probate in common form. When set aside by the County Court.* When a will has been proven in *common form* before the County Court, it can, alone, be annulled by the judgment of the Circuit Court, founded upon the verdict of a jury against the validity of the will.
2. SAME. *Same. Will sustained. Qualification of executor.* If a will has been proven in common form before the County Court, and the executor duly qualified; but afterwards the same is certified to the Circuit Court and an issue formed testing the validity of said will, as to the real estate, leaving it unaffected as to the personalty, the office of executor.

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which had been regularly conferred on him, with all its rights, duties and consequences, continued to exist in full force, as if no contest upon the will had taken place.

3. **STATUTE OF LIMITATIONS.** *Executor and administrator. Act of 1789.* If proper and effectual steps are not taken within the time limited by the personal representative, to enforce satisfaction of a claim in his own favor upon the estate, the act of 1789 will form a bar, as in the case of other creditors, failing to sue within the proper time.

FROM SUMNER.

Decree for the complainant, RIDLEY, Chancellor presiding.
Defendants appealed.

GUILD and SOLOMON, for the complainant.

HEAD & TURNER, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant seeks to obtain satisfaction for services rendered by him, and expenses incurred, in the support and maintenance of his father and mother for a number of years. The bill alleges that a verbal contract was entered into between the complainant and his father to the effect, that, upon the undertaking of the former to support his parents, during life, and to pay his father's debts, the latter agreed and bound himself, in consideration thereof, to give complainant a tract of land, at his death, or to pay him liberally for his services. The bill alleges that this contract was entered into in 1832, and that complainant, on his part, performed the same during the lives of his father and mother, the former of whom died in 1854, and the latter the preceding year.

The proof does not establish any such contract as is alleged in the bill. The most distinct statement upon the subject, is found in the testimony of the son of complainant, in which he details a conversation which took place between his father and grandfather. The date of the conversation is not given; but from the fact stated, that the will of his grandfather was

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exhibited at the time, which bears date the 24th of August, 1849, the conversation must have been subsequent to that date. The substance of it is : " Grandfather said that he wanted father to support him and his wife, and to pay his debts, and that he should have the land ; my father said that he would do it, and did comply with his contract."

By the will of complainant's father, above referred to, the two tracts of land, of which he was owner, were devised to complainant. But said will being attested by only one subscribing witness, was inoperative to pass the title to the devisee.

It appears that in December, 1854, after the death of complainant's father, said will was regularly proved in common form, in the county court of Sumner ; and the complainant was then and there duly qualified as executor thereof. Afterwards, at the February sessions, 1855, of said court, on the application of the defendants, the probate of the will was set aside, and the will was certified to the circuit court, where an issue was made up to test the validity of so much of the will as assumed to dispose of the real estate ; the validity thereof, so far as the personal estate was concerned, not being questioned. At the June term, 1858, of the circuit court, a trial of the issue was had ; and the will was declared void as to the devise of the lands, and certified back to the county court ; and by the judgment of the latter tribunal, the probate of the will, as to the personal estate, was re-instated, and the order for the appointment of the executor re-affirmed.

Pending the contest upon the will, the complainant filed a bill in equity against the present defendants, in which it was assumed, that, although the will might be inoperative to pass the title to the lands attempted to be devised to him, for want of two subscribing witnesses, yet effect might be given to it as a *deed*, or, if not so, that it was such a "writing" as under the statute of frauds, would entitle him to a specific execution of the contract.

This bill was finally dismissed in this court, at the December term, 1857.

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After the dismissal of that bill, and after the termination of the contest upon the will, the present bill was filed, to recover compensation for the value of complainant's services, on the ground that complainant was without remedy at law, being himself the personal representative of the estate of his alleged debtor.

To this bill the defendants set up, in their answer, and rely upon the decree in the former cause, and also upon the statutes of limitation of two, and of six, and of seven years, in bar of any relief.

The Chancellor, however, decreed for the complainant, and ordered an account of the value of the services of complainant, and his expenditures.

We are aware of no principle upon which this decree can be maintained. In the first place, there is no proof whatever of any promise or agreement on the part of John Byrn to make complainant compensation in *money*, or in any other mode than was attempted, namely, by giving him the land, at his death. And this having failed, it is clear, that if any remedy at all were left to the complainant, it was founded, not upon the contract, but altogether aside from it, upon an implied promise. Whether or not, in such a case, the law would imply a promise to compensate the party, in money, is a question not necessary to be decided, and we express no opinion upon it. It is sufficient for the present case, that if such a contract or promise might be implied, the statute of limitations would form a bar to the recovery for any services rendered beyond the period of six years before the commencement of the suit. And evidence of a promise to *give the land*, or of an acknowledgement of the obligation to do so, would not be admissible, either to support the action founded on the implied promise; or to defeat the operation of the statute.

But, again: The complainant having taken no effectual or proper steps to assert this claim, within two years from the date of his qualification as executor, how is the bar of the act of 1789, ch. 23, sec. 4, to be avoided?

The order of the county court setting aside the probate of

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the will in common form, in that court, was inoperative. The court had no power to make such an order. The probate in common form, in such case, can be annulled only by the judgment of the circuit court, founded upon the verdict of a jury against the validity of the will. See 2 Swan, 162 ; 2 Sneed, 678.

It is clear, therefore, that the validity of the will as to the personal estate, remained unaffected by the proceeding in the circuit court; and the probate of the will, to that extent, and the qualification of the executor, in like manner, remained unaffected. The office of executor, which had been regularly conferred on the complainant, with all its rights, duties and consequences, continued to exist in full force, as if no contest upon the will had taken place. So far as regarded the proceeding to have the will declared inoperative as to the lands, attempted to be devised, the complainant, in his character of executor, had nothing to do, except merely to allow the use of his name, as a matter of form; but it did not at all interfere with his rights or duties as executor, in the management of the personal estate, as to which there was no question involved in the contest.

From this it follows, that the subsequent appointment of the complainant *as administrator*, in August, 1858—after the contest was at an end—was not only unnecessary and improper, but likewise null and void; and in the character of executor, the complainant continued to be, and still is, the legal representative of the estate.

We have seen that the complainant was qualified, and properly constituted executor, in December, 1854; and the demand, now set up, then existed and was due, according to the statement of the bill, which was not filed until the first of September, 1858. Can this demand be now enforced—all other objections out of view, for the present—under the act of 1789? We think not.

We have already held that an administrator cannot enforce the satisfaction of a claim *due to himself*, if, at the time of his administration, it were barred by the general statute of

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limitations. 10 Humph., 301. And in the case of *Wharton and Wife v. Marberry*, 3 Sneed, 603, the principle was extended, so as to apply to a case where, though the demand was not barred at the time of administration, yet the length of time requisite to form the bar, had elapsed before the executor took any measure to obtain satisfaction thereof. And such is now the settled rule, as respects the application of the general statutes of limitation. This is giving to the general statutes a more rigid and severe application, as against the personal representative of the estate, when a creditor, than against other creditors. As regards other creditors, the personal representative may, at his peril, exercise a discretion, whether to set up the statute or not; but in regard to *his own* demand, he is intrusted with no such discretion. This reasoning applies with equal, if not greater, force, to the act of 1789, limiting the time within which the creditors of deceased persons shall bring suit. As respects this statute, it has always been held that the personal representative has no discretion; and his neglect to set it up as a defence, whereby a recovery is had against him, is held to be a *devastavit*. All the reasons for requiring other creditors to assert their claims against the estate, within the time limited by this act, apply with increased force, to the claim of the personal representative. And the question being now directly presented, for the first time, we hold that, if proper and effectual steps be not taken, within the time limited, by the personal representative, to enforce satisfaction of a claim in his own favor, upon the estate, the act of 1789 will form a bar, as in the case of other creditors failing to sue within the proper time. This point is decisive of the whole case. It does not become necessary, therefore, to notice the question, whether or not the proceedings and decree upon the former bill, are a bar to the present suit.

Decree reversed, and bill dismissed.

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WILLIAM SCRUGGS v. AMMON L. DAVIS.

1. **COMMON CARRIER.** *Liability for slaves. Rule modified.* Slaves have volition and possess reason and feeling. They cannot be stored away like a bale of goods, or other merchandise. The great rigor of the law, therefore, as to the liability of common carriers of goods, or other property, does not apply to slaves. Where a slave is placed with a common carrier, to be transported from one point to another, for hire or reward, the carrier would be bound to use ordinary diligence only, in taking care of him, and securing him against injuries, or escape.
2. **SAME.** *Same. Question reserved.* If the master goes on board a boat or other conveyance, and takes his slave with him, having charge and control of the slave, and without an express undertaking by the carrier, to watch and guard his movements, would any duty devolve on him in reference to the slave?
3. **EVIDENCE.** *Statements of witness on former trial. Bill of exceptions.* It is not admissible to prove what a witness swore to on a former trial, because his attendance could not be had. This rule applies where the witness is dead. Neither is a bill of exceptions admissible in such case, to prove what the witness stated on the former trial.

FROM DAVIDSON.

This cause was tried before Judge BAXTER, at the January Term, 1859.

NEIL S. BROWN and A. L. DEMOSS, for the plaintiff in error.

J. S. BRIEN and ANREW EWING, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

The plaintiff came aboard of the steamboat "Tennessee," at Eddyville, Ky., of which the defendant was owner and captain, and took passage for himself and negro man slave. for Nashville. The slave had been runaway from his master

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and recaptured. He was brought upon the boat with his arms bound, and so continued. He told the clerk he would rather die than return home, of which his master was immediately informed, and cautioned, and he said there was no danger. A few miles below Nashville, the slave was missing, and there is no doubt but that he threw himself out of the boat and was drowned, though no one saw him do the act, as his body was soon after found, and sufficiently identified, by the fact that his arms were still tied with a cord, as when he was last seen upon the boat. There was some proof tending to show that the captain had untied him, and set him to pumping, but replaced the cords when he had finished.

When the case was before us at a previous term, we reversed for errors in the charge. But the same questions are not now in the case.

A new trial is again asked, for other supposed errors of law in the instructions to the jury.

The Court held, "*that if the slave was put on the defendant's boat to be carried for hire, or reward, the defendant would be bound to ordinary diligence only in taking care of him and securing him against injuries or escape.*"

This charge is sustained by the authority of the Supreme Court of the United States, in *Boyce v. Anderson*, 2 Peters, 156. The principle there settled, is, that in the conveyance of slaves for pay, the "carrier is liable *only* for *ordinary* neglect." The distinction is there taken, by Chief Justice Marshall, between the case of slaves and other property. The great rigor of the law, rendered necessary by necessity and sound policy, as applicable to common carriers of goods, and inanimate property, is there held not to apply to the case of negroes, who are intelligent beings, although a species of property. They have volition, and are endowed with reason and feelings, and cannot be safely stored away like a bale of goods, or a common package. The rules that apply to slaves, and govern the liability of carriers in relation to them, more nearly resemble those which relate to passengers,

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than common goods. The case of slaves, seems, as is remarked by the Court, in *Stokes v. Saltonstall*, 13 Peters, 192, to be a sort of intermediate one between goods and passengers. As to them, the principle settled in the former case, is not controverted.

In Angell on Car., sec. 122, the doctrine of *Boyce v. Anderson* is adopted, and sustained by reference to later cases in South Carolina and Alabama ; or rather, these cases conform to the former, and adopt its principle.

We think there can be no doubt of the correctness of the charge on this point. Considering slaves as property, it is certainly an exception to the general law of liability, in relation to common carriers. But it is an exception produced by reason of necessity, from the nature of the property. But in a case like this, where the master was on board, having his slave under his own care and management, and the loss resulted from the slave's own act, by destroying himself, and not from any want of skill or management on the part of the captain, or his employees, we could not hesitate, independent of those high authorities, to apply to the case the mitigated rule stated by His Honor. A question might arise, if the case required it, whether under the circumstances of this case, the master having charge and control of his own slave, any duty at all devolved upon the carrier, without an express undertaking, to watch and guard his movements, so as to prevent his leaping overboard. So far as we can see, the plaintiff asked nothing more than to be carried with his slave for the ordinary pay as passengers. If the slave had been placed upon the boat to be carried without his master, the question would, perhaps, be different. But let that be as it may, the law, as laid down in the charge, applies to the latter case, and, of course, cannot be complained of by the plaintiff, whose case falls under the first hypothesis, and for that reason might probably fall under a more mitigated rule as to the accountability of the carrier.

A question is made upon the rulings of the court in regard to the evidence. Whatever error was committed in that

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respect, was in favor of the plaintiff, and of that he cannot complain. It was right not to admit the bill of exceptions, made in the former trial, to show what the witness, Smith, then said, because his attendance could not be had upon the last trial; and we are not aware of any authority that would admit what he swore before, to be proved by others as he was not dead. But certainly, if *that* could be done, it was not wrong to allow him to be impeached by the proof of contradictory statements, or in any other legal mode.

The judgment will be affirmed.

DAVIS *et al.* v. PETWAY *et al.*

1. **SALE OF REAL ESTATE. Sale at Auction. Puffers and By-bidders. Fraud.** The vendor of land at public auction may, unknown to bidders, privately depute a third party to attend the sale, and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an under value; but, if a number of persons are employed as puffers to make fictitious biddings, with the view of taking advantage of the eagerness of buyers, to screw up the price, and not for a defensive precaution, to prevent a sale at an undervalue; this is an imposition and a fraud; and avoids the sale.
2. *Same. Same. Same. Same.* If the vendor publicly reserve the right to make one bidding and no more, through a person who is named; and then secretly employs another person to make general and repeated biddings, this is such a fraud as will entitle the purchaser to abandon the contract.
3. *Same. Same. Sale without reserve.* If, by the advertisement, the property is to be sold *without reserve*, this excludes all interference by the vendor, or others for him, with the right of the public to have the property at the highest bidding; and, in such case, any arrangement between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale void.
4. *Same. Same. Purchaser must be misled.* In order to avoid a sale on

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this ground, it must be shown that under-bidders or puffers, are employed to enhance the price and deceive other bidders; and that they are in fact misled thereby.

FROM DAVIDSON.

The bill was dismissed by the Chancellor. The defendants appealed.

TRIMBLE and McEWEN, for complainants.

REID, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

We perceive no error in the decree of the Chancellor in this cause.

The complainant Davis seeks to avoid the purchase of four small lots of land, made by him, at public auction, on the 23d of June, 1858, on the ground that *by-bidders* were employed, whereby he was induced to give a higher price for the same, and more than the lands were worth.

It appears that the lands had been divided into small lots, and were brought to sale by the executors of H. Petway, pursuant to the directions of the will of the testator.

The executors employed a person of experience to aid in the management of the general business of dividing, estimating the value, and selling the lands. A map was made, upon which the several lots were represented, and the minimum value of each marked thereon in figures. This was done by the executors, on consultation with the person employed by them to superintend the sale. The estimated value of the several lots, seems from the proof, not to have been unreasonable.

The proof clearly establishes that, prior to the opening of the sale, no arrangement was made, nor was any thing said on the subject of procuring *by-bidders* at the sale. But it appears, that during the progress of the sale, when the biddings

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for any particular lot were below the estimated value, the person employed to conduct the sale—of his own accord and without any conference with the executors—would request some one of the by-standers to bid for the same to an amount in no instance exceeding the minimum value previously placed on the same ; nor was more than one individual spoken to in any instance, to bid for the same lot.

It appears, that, perhaps, three different persons had been thus requested to bid during the progress of the sale, for different lots, by the agent conducting the sale, without the knowledge of the executors. But there was no such by-bidding as to any of the lots purchased by the complainant, except one ; and the proof shows that in that instance the lot did not sell for more than its fair value, nor beyond the minimum price fixed upon it. It also appears, that, for some considerable time after his purchase, the complainant seemed to be perfectly satisfied with his purchase.

Upon these facts, the Chancellor dismissed the bill, and we think this was proper.

There is much discussion in the books upon the question, whether a sale at auction may be avoided by the purchaser, because by-bidders or puffers were employed by the owner or auctioneer. The proper way, it is said, is to give notice if such a thing be intended. But yet, the weight of authority, both in this country and in England, seems to be in favor of permitting the owner, without such notice, to employ a person to bid for him, if he does this in good faith, with no other purpose than to prevent a sacrifice of the property under a given price. 2 Parson's on Con., 417. 2 Kent's Com., 538, 539, (5th Ed.) Addison on Con., 134, 154. The latter author lays it down, that the vendor may, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an undervalue ; but he cannot lawfully employ more than one person for such a purpose. If a number of persons are employed as puffers to make fictitious biddings, with the view of taking advant-

age of the eagerness of buyers to screw up the price ; and not for a defensive precaution to prevent a sale at an undervalue, this is an imposition and a fraud, and avoids the sale.

And if the vendor publicly reserves the right to make one bidding and no more, through a person who is named, and then secretly employs another person to make general and repeated biddings this is such a fraud as will entitle the purchaser to abandon the contract. And if by the advertisement the property is to be sold "without reserve," this excludes all interference by the vendor, or others for him, with the right of the public to have the property at the highest bidding. And, in such case, any arrangement between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale void.

It must often be very difficult, of course, to discriminate between an honest design to prevent a sacrifice of the property, and a fraudulent purpose to impose on bidders : but this does not affect the principle involved in the distinction.

It seems, that in order to avoid the sale on this ground, it must be shown, that underbidders or puffers are employed to enhance the price and deceive other bidders, and that they are in fact misled thereby. 1 Story's Eq. Jur., sec. 293.

According to this doctrine, it is clear that, in the present case, there is no ground for avoiding the sale.

Nothing more was done by the agent of the defendant's than was in good faith, considered necessary to prevent a sale of the property at less than its fair value. This much it was lawful and proper to do. And there is no pretext for saying that the complainant was misled, or imposed on thereby.

Decree affirmed.

James Brown v. W. C. Moore, Adm'r, &c.

JAMES BROWN v. W. C. MOORE, Adm'r, &c.

GIFT. *Causa mortis. Donor's note.* A donor's own promisory note, payable to the donee, cannot be the subject of a *donatio causa mortis*.

FROM SUMNER.

This cause was heard at the October Term, 1859, before His Honor, Judge TURNER.

G. W. ALLEN and HEAD & TURNER, for BROWN.

JO. C. GUILD, for MOORE.

CARUTHERS, J., delivered the opinion of the Court.

This action was brought to recover \$200, the amount of a lost note, given by Phillip Brown, the intestate of defendant, in 1855, to the plaintiff.

The defence is want of consideration.

James and Phillip were brothers. The latter bought of the former, his interest in the land of their father, and paid him \$400; and obtained his deed. There is a little uncertainty as to the contract in relation to the consideration. Phillip, a short time before his death, and when he did not expect to recover from a severe attack of hemorrhage of the lungs, in speaking of this note, which he had a short time before enclosed to his brother in a letter, stated "that he had purchased of Matthew Brown and James Brown, the plaintiff, their interest in his father's tract of land for \$400 each; and that some time after the purchase, his brother Matthew had threatened to sue him for about \$200, which amount he claimed to be due him, and rather than have a suit with his brother, he paid him \$200, and upon reflection, having bought James' interest for the same amount, \$400, he thought it his duty to pay James \$200, to make him equal with Matthew, and that he had executed his note for \$200 to James, payable twelve months after date, and had enclosed it to him." The

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land was before this time sold, perhaps under a decree of court, and the price obtained made the part of each heir, \$600. Matthew proves, that the condition of the sale to Phillip, was, that he was to pay him whatever the land might sell for, and it was upon that ground that he claimed the additional sum of \$200, and that he made no threat to sue, but that his brother paid him voluntarily and willingly. Mary Jane Moore, a sister, proves, that Phillip was by contract to pay James whatever he paid Matthew, and that the note was given in compliance with that contract. But when the note was received by James, in his letter of acknowledgment of October 17th, 1855, he states that he has no further claim for the land ; but, that if his brother, "upon mature deliberation, still thinks he ought to have \$200 more, though he does not claim it as a right, he "will receive it as a present."

The note was not returned in this letter as is stated ; but was retained from all we see, and this is the last we hear of it till after the death of Phillip, which was before it fell due.

The plaintiff assumed two positions against the defence of want of consideration :

1. That there was a sufficient consideration. The court charged that if there was a sale and purchase of land, and the note was given "in due consideration of such sale," then it would be binding and recoverable.

2. That it would be good as a gift *donatio causa mortis*. The court charged on this point, that if the note was made and delivered in view of death, to take effect in that event, and he did die, as contemplated, it would be obligatory, and recoverable against his administrator.

On this point, we think His Honor erred. There may be said to be *some* conflict of authority on the question, but very little. The preponderance is clear and decided against the validity of this species of donation of a man's own note, or obligation for money. There was a serious and long continued controversy in the books, as to the validity of a gift of this description of any chose in action, or claim in favor of the donor against others, but we think there is but little, if any

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authority to be found that the donor's own note to the donee can be made the subject of this kind of gift. The case of *Wright v. Wright*, 1 Cowen, 598, would seem to sustain the charge. That case, as far as we can see, stands alone, and is not well considered. It does not notice the distinction between the donor's own note payable to the donee, and a note, or other security for the payment of money, held by him against a third person.

In *Pouste v. Stone*, 14 Picking, 201, the question, is elaborately examined and discussed by C. J. Shaw, where all the authorities, English and American, are brought under review, and the conclusion arrived at, that "a donor's own promissory note, payable to the donee, cannot be the subject of a *donatio causa mortis*." The case in Cowen, is there referred to, and held not to be law.

We are satisfied with the reasoning and authority of that case, and adopt it as the law upon the subject. The case of *Grover v. Grover*, 24 Pick., 261, draws the distinction between gifts *inter vivos*, and, *causa mortis*, and sustains the same doctrine.

But it would be a question, whether this error of law should produce a reversal of the judgment, as it might be regarded as an abstraction in reference to the facts of this case, if it were clear upon the other point, that the plaintiff was entitled to recover. We will not now decide whether the action can be maintained, or not, upon the other ground—the sufficiency of the consideration to sustain the promise.

The case will, therefore, be reversed, and sent back for another trial, when the proof will be directed and the case examined with the single view, as to the sufficiency or insufficiency of the consideration of the note. We intimate no opinion, but leave the case open upon *this* point. The parties may be able, upon examination of the authorities, to satisfy themselves whether this is a naked promise for want of consideration or not. The proof can probably be made a little more explicit, on that question.

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BENNETT *et al.* v. JOHN P. KENNERLY *et al.*

1. **SALE OF SLAVES.** *Administration. Parties.* A sale of slaves made by an order of court, upon application, by petition, of the administratrix and her husband, to which the minor children, who were interested in said slaves, were not made parties, for the payment of debts due from the estate, or to reimburse them for advances made out of their own funds, for the benefit of the estate, is an absolute nullity.
2. **SAME.** *Same. Extent of recovery. Damages.* The sale being a nullity, is a conversion of the slave; and the minor children may elect to take from the administrator the value of the slave at the time of the sale; or may pursue the slave in the hands of the purchaser and recover the possession, or the present value of the same.
3. **SALE OF REAL ESTATE.** *Partition. Fraud.* If the guardian of minors procure an order for the sale of their land, and have dower assigned, for the fraudulent purpose of preventing persons from bidding for the other portion, intending, indirectly, to become the purchaser, the sale will be set aside and declared void.
4. **SAME.** *Same. Purchase money. Rents. Improvements.* Upon setting aside the sale, the purchase money will be refunded to the guardian, and he will be held to account for the reasonable value of the annual rents, with an allowance for permanent improvements made upon the land, to the extent that such improvements have enhanced the value of the property, but not to exceed the value of the rents.

FROM FRANKLIN.

The Chancellor dismissed the bill. The complainants appeared.

PETER TURNEY, for the complainants.

ESTELL & COLYAR, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainants, who are minors, seek to set aside the sale of a tract of land and two slaves, procured to be made

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by their guardian, in conjunction with the personal representative of the estate of their deceased father.

H. K. Bennett, their father, died in Franklin county, in 1846, leaving a widow and three infant children surviving him. The widow was appointed administratrix of the estate, which consisted of a tract of land, some slaves, and other personal property. In 1848 the widow intermarried with the defendant, John P. Kennerly, who, shortly afterwards, was appointed guardian of the three children, and continued to occupy that relation until July, 1855, when he was displaced, by the final judgment of the circuit court of said county, for mismanagement of the estate of his wards and failure to comply with the statutes in such cases, as the record states.

The bill does not specifically pray for an account against either the guardian or personal representative: the relief asked is confined to an impeachment of the sales of the land and slaves. The proof, in this record, presents a strong case for relief.

At the November term, 1848—very soon after the marriage of Kennerly with the widow—a petition was presented, in their joint names, to which the minor children were not parties, at all, asking the circuit court to sell two slaves, Felix and George, each stated to be worth *about* \$250.00, for the purpose of paying off debts due from the estate, “to the amount of *two hundred and ten or fifteen dollars*, of which there is no specification whatever. On the same day on which the petition was presented, an order was made, on the mere statement of the petition, without proof, that the petitioners should sell Felix; and he was accordingly sold, and purchased by Sherrod Williams, at the price of \$186.00. This sale was confirmed afterwards by the court.

At the March term, 1853, of said circuit court, another petition, in the names of Kennerly and wife alone—the minor children being neither plaintiffs nor defendants—was presented, asking the sale of “one or more of the remaining slaves of the estate to re-imburse the petitioners for advances

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alleged to have been made, out of their own funds, for the benefit of the estate. And on the same day on which it was presented, an order was made that the clerk of the court should proceed to sell "such one of the negroes," belonging to the estate, as the petitioners should "deliver to him;" and pay over the proceeds of said sale to the petitioners. Under this order, a boy named George was sold, on the 6th of June, 1853, at the price of \$355.00. The proof establishes, and it is not denied by defendant's counsel, that Kennerly secretly procured one Henry Sanders to bid for the slave, for his, Kennerly's benefit; and it is likewise proved, that Kennerly immediately took possession of the slave, as his property, and sometime afterwards, sold him for \$500.00.

At the same term of the court, Kennerly and wife presented another petition, joining the minors with them, asking to have the remaining slaves divided, and to have *dower* assigned to Mrs. Kennerly; and also asking to have the remainder of the land sold, on the ground that it was not susceptible of division amongst the children. All which was ordered to be done.

As respects this part of the case—the assignment of the dower, and the sale of the residue of the land—the conduct of the guardian, according to the proof, was a gross fraud upon the rights of the infant wards.

The tract of land was a small one, consisting of only about one hundred and thirty acres; and it was deficient in timber. In laying off the dower, the mansion house and other improvements, were abandoned, and the dower was so laid off as to take in the principal part of the timbered land. This was procured to be done by the interference and management of the guardian and his brother, who induced the commissioners to yield to their wishes. And the motive for this—as unwittingly disclosed by the guardian to Farris, one of the witnesses—was to depreciate the value of the children's portion of the land, by depriving it of timber, so that, when it was sold, no one would be likely to compete with

him in bidding for it. The portion of the minors was directed, by the order, to be offered at the minimum price of \$9 per acre ; it was sold, however, at over \$12.50, and was secretly purchased by the guardian, through his brother-in-law, Gibson. This fact is clearly proved, notwithstanding the astounding denials of the answers of Kennerly and Gibson. The very shallow artifice resorted to, with a view to cloak this fraudulent scheme, was this : that the title should be decreed to Gibson ; and, inasmuch as the purchase money was actually advanced by Kennerly, he should take Gibson's note for it, and, to give the thing the semblance of a loan ; and, thereupon, by an instrument of writing, the real purchaser, Kennerly, was to go into possession of the land, and hold until Gibson discharged said note ; which was never to be done. This is a very brief and imperfect sketch of this somewhat complicated and most aggravated scheme of fraud, to acquire title in himself to the land of his wards, concocted and executed by the guardian and his associates.

This transaction cannot be permitted to stand. The sale will be set aside and declared void ; the purchase money, with interest, will be refunded to Kennerly ; and he will be held to account for the reasonable value of the annual rents, with an allowance for permanent improvements, made upon the land, to the extent that such improvements have enhanced the value of the property, but not to exceed the value of the rents. The complainants are also entitled to have the assignment of the dower set aside, if it shall be thought most for their interest to have a re-assignment.

The sales of the slaves were absolutely void. As to the boy, George, fraudulently purchased by the guardian, and re-sold by him, a clear case of conversion is made out ; and the complainants have an election to insist, either upon a return of the slave, or his present cash value, or the price for which he was sold, with interest. As respects the boy, Felix, the purchaser is not a party ; the complainants have an unquestionable right to pursue the slave in the hands of Williams, the purchaser, and either to recover the possession,

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or the present value of the slave ; or they may elect to take from Kennerly the value of the slave at the time of the sale—the sale being a conversion of itself, on the ground that it was an absolute nullity.

As regards the land alleged to have been disposed of by the act of the guardian, we express no opinion ; this question will be left open until the final hearing.

The case will be remanded to have the account taken, and such amendments made as shall be thought proper. The next friend of the complainants is displaced ; and on the return of the cause to the chancery court, the Chancellor is directed to substitute a suitable person in his stead.

The decree dismissing the bill is, in all things, reversed, and the entire costs of the cause will be paid by the defendants, the Kennerlys and Gibson.

WILLIAMS *et al.* v. BOWMAN, EX'R, &C.

1. SPECIAL COMMISSIONER. *Clerk.* Act of 1849, ch. 51, § 2. By the Act of 1849, ch. 5, sec. 2, the appointment of Special Commissioner is distinct from the office of Clerk. The appointment is not under the Constitution, but under the authority conferred by the statute. The two offices are, in legal contemplation, distinct, though filled by the same person. The Special Commissioner is properly a *trustee* ; and the condition of the bond obliges him to perform all the duties of the trust.
2. SAME. *Duration of the appointment. Sureties.* The duration of the appointment is not limited by law. This is left to the discretion of the court, according to the exigencies of the various cases that may arise. And if the duration of the appointment be not limited, as to time, by the court, in the order of appointment, it follows that the appointment continues until the duties of the trust are discharged.
3. SAME. *Same. Same.* By the express terms of the bond, the Special Commissioner is bound faithfully to account for and pay over all such sums of money as may come into his hands ; and if his term of office

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of Clerk expires before he has wound up his trust as Special Commissioner, and he retain and collect notes as such Commissioner, and fail to account for and pay over the same, he and his securities are liable therefor.

4. **SAME.** *Same. Handing over notes. Question reserved.* If the office of Special Commissioner and Clerk are united in the same person, is it his duty, on retiring from the office of Clerk to hand over notes taken as Special Commissioner, to his successor; and, if so handed over, will it discharge him and his securities from liability?

FROM MONTGOMERY.

HOUSE, for the complainants.

ROBB & BAILEY, for the defendants.

MCKINNEY, J., delivered the opinion of the Court.

This bill was filed to enjoin a judgment for \$1536.38, rendered against the complainants, as the sureties of one Joseph M. Dye, at the May term, 1858, of the circuit court of Montgomery. The Chancellor decreed for the complainants, and to reverse this decree, an appeal was prosecuted to this Court.

It appears that, on the 17th of May, 1852, said Joseph M. Dye was duly qualified as clerk of the circuit court of Montgomery; and that, in addition to the several bonds executed by him as clerk, he likewise executed a bond, with the complainants as his sureties, in the penalty of twenty thousand dollars, pursuant to the act of 1849-50, ch. 51, sec. 2, with the condition, that "the said Joseph M. Dye, clerk of the circuit court of Montgomery county, *shall well and faithfully account for and pay over all such sums of money as shall come into his hands as Special Commissioner,*" &c.

The record shows that at the September term of said circuit court, 1855, a decree was made, on the petition of the defendant, Bowman, as the executor of one John Baker, dec'd, appointing and directing said Joseph M. Dye, "clerk of said court," to sell certain slaves, in the petition named,

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at public auction, after giving three weeks notice, on a credit of twelve months, taking notes with good security for the purchase money. In obedience to this decree, said slaves were sold on the 13th day of October, 1855, by said Joseph M. Dye ; and notes with security were taken, payable to himself, twelve months after date, from the several purchasers.

On the 17th of May, 1856, the official term of Dye, as clerk, expired, and Charles Bailey was appointed his successor as clerk of said court.

The notes taken by Dye, on the sale of said slaves, did not mature until five months after the expiration of his term, and his retirement from said office. He retained said notes, however, and at their maturity, as is probable, or shortly afterwards, received into his hands the money due thereon and failed to pay over the same, or any portion thereof, but appropriated it to his own use ; and being insolvent, as is alleged, the money is lost.

At the January term of said circuit court, 1858, the defendant, Bowman, entered a motion for judgment against said Dye and his sureties, on the official bond before mentioned, for the money thus received by Dye, with interest, &c. And at the May term following, judgment was entered accordingly.

To enjoin this judgment, is the object of the bill. The defendant submitted to answer, without any exception to the jurisdiction.

The complainants allege, and the fact is conceded, that they had no notice of the proceeding, by motion, in the court of law, and thereupon no defence was made. The ground of relief assumed is, that the money having been received by Dye, after the expiration of his term of office, the sureties cannot be held liable therefor, upon their bond.

The general principle asserted by the counsel of the complainants, that the sureties of a public officer are not liable for his acts, after the expiration of his term, or beyond the scope of the bond, is not controverted. But this is not the point to be considered.

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The argument for the complainant takes for granted that Dye received the money, as former *clerk* ; but this is assuming the very point in controversy. The question upon which the determination of the case depends, is this : are the offices of clerk and special commissioner to be regarded as one and the same office, under the statute, or as separate and distinct offices ? The solution of this question depends upon the construction of the act of 1849, before referred to.

The first section declares, in substance, that the clerks of the circuit, chancery, and supreme courts, "when appointed by the court of which they are clerks, respectively, to act as *special commissioners* to sell property, under any decree of the court of which he is clerk, or as *receiver*, shall, together with their securities, be liable under their bonds, for the faithful discharge of their official duties, executed by them under the act of 1794, ch. 1, section 2, for all such sums of money as may come into their hands by virtue of said appointment as special commissioner, or receiver."

And by the second section, said clerks are required to execute additional bonds, with good security, in such sum as the court may deem sufficient, "*conditioned for the faithful accounting for, and paying over, of all such sums as may come into their hands, as such special commissioners.*"

It had been determined by this court, in the case of *Waters v. Carroll*, 9 Yerg., 102, that where a clerk had been appointed by the court a receiver, and, as such, had received money, the sureties in his official bond were not responsible for it ; and for the reason that the duties of receiver did not appropriately belong to the office of clerk.

To meet this case, and others falling within the same principle, the act of 1849 was probably passed. This statute does, in some sense, annex the office of receiver, and of special commissioner, to that of clerk ; but not so as to merge the former in the latter. The two offices are still distinct. The duties of the office of special commissioner are not made part of the official duties of the office of clerk, as such. The court may appoint the person occupying the office of

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clerk, as special commissioner; or a different person may still be appointed to that office, in the discretion of the court. And, in legal contemplation, the offices are as distinct, though filled by the same person, as if filled by different persons. The argument for complainant, that the office of special commissioner is made part of, or an appendage to, the office of clerk, might seem, at first view, to derive some countenance from the provision contained in the first section, declaring that, in case of the appointment of the clerk to act as special commissioner, he and his sureties shall be liable under the official bonds executed by them under the act of 1794. But the force of this argument is obviated by the subsequent provision of the act, requiring a new and separate bond to cover the liability of the clerk when appointed to act as special commissioner; and under the latter provision, the bond, in the present case, was taken; the condition is in exact conformity with the act.

In our view, the appointment as special commissioner, is distinct from the office of clerk, under the statute; its duties do not appertain to the proper functions of the office of clerk. The appointment is not under the constitution, but under the authority conferred by the statute. The duration of the appointment is not limited by law. This is left to the discretion of the court, according to the exigencies of the various cases that may arise. And if the duration of the appointment be not limited, as to time, by the court, in the order of appointment, it follows, of course, that the appointment continues until the duties of the *trust* are discharged. The special commissioner is properly a *trustee*; and the condition of the bond obliges him to perform all the duties of the trust.

By the express terms of the condition he is bound faithfully to account for, and pay over, all such sums as may come into his hands as such special commissioner. Dye received the money, in his character of trustee, when it fell due; and the relation of trustee continued to exist until the money was

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accounted for and paid over, it could have no earlier termination.

Whether or not it was the duty of Dye, on retiring from the office of clerk, to hand over the notes to his successor; and whether or not his doing so would have been a discharge of the trust; are questions not necessary to be now considered, inasmuch as he did not do so. If he had, the court might, doubtless, have appointed his successor to have finished the execution of the trust.

In this view, the judgment of the circuit court was correct. The 4th section of the act of 1849, expressly authorizes a judgment, by motion, in such cases; and does not require any notice of the motion to be given.

It follows that the decree of the Chancellor is erroneous. It will be reversed and the bill dismissed.

 KELLY v. GORDON et al.

1. PRINCIPAL AND SURETY. *Injunction bond. Is joint and several.* The undertaking of the surety in an injunction bond where there are several complainants, is in law, for the principals, *severally* as well as *jointly*. That is, the surety is bound in effect, that each and all of his principals shall perform and fulfill whatever decree may be rendered in the cause against all, or, either of them.
2. SAME. SAME. *Effect of abatement as to one principal.* The abatement, therefore, of a suit in equity, as to one of several joint plaintiffs by the neglect of both parties to revive, or the discharge of one upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties, against whom a final decree may have been properly rendered.

 FROM MAURY.

GANTT, for the plaintiff in error.

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FLEMING, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of covenant, brought against Kelly alone, as the surety to an injunction bond. Verdict and judgment were for the plaintiff.

In August, 1852, A. Bradshaw and Robert Campbell, jointly, filed an injunction bill against Gordon, the administrator of the estate of William Bradshaw, deceased, and the other distributees of said estate, to enjoin a judgment for \$1894.92, obtained against them by Gordon, as administrator.

The facts appear to be, that A. Bradshaw, who was one of the distributees of said estate—purchased property at the administrator's sale ; and executed his note, with Campbell as surety, for the amount of his purchase. The note was not paid at maturity, and judgment was taken thereon. The bill was filed by A. Bradshaw and Campbell, to have an account of the administration, and an adjustment of the rights and equities of the several distributees, upon the assumption, that on a final settlement, there would be found due to A. Bradshaw, an amount sufficient to extinguish the judgment in favor of the administrator against him and Campbell.

This bill was delayed in various ways, until December, 1857, when it was brought to a final hearing ; and by the decree, the injunction was made perpetual, except for the sum of \$1138.72.

During the pendency of the suit, and more than two years before the commencement of the present action—which was instituted on the 10th of August, 1858—Robert Campbell died ; and no step having been taken on either side, to revive the suit against his personal representative, the cause proceeded in the name of A. Bradshaw alone, to a final hearing ; and a decree was pronounced against him alone for said sum of \$1138.72.

Said Bradshaw being insolvent, as is alleged, this suit is brought to recover the amount of said decree from Kelly, as surety to the injunction bond.

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The ground of defence is, that the failure to pursue the personal representative of Campbell, was a discharge of the surety. The argument is not without plausibility, that the injunction bond being for the benefit of the defendants ; and the undertaking of the surety, being on the faith of the responsibility of *both the principals* in the bond ; the neglect of the defendants to revive the suit against Campbell's representative, was prejudicial to the surety, because the hazard of personal liability and loss, on his part, was not only thereby increased, but the chances of indemnity were, in the same proportion, diminished. But we cannot assent to the correctness of this reasoning.

We have been referred to no case in point. The case of *Harris v. Taylor*, 3 Sneed, 536, 541, is very different. In that case, the plaintiff voluntarily entered a *nolle prosequi* as to one of the defendants, in an action of *replevin*. And it was held, that as the undertaking of the sureties, was for the defendants jointly, the discharge of one of the defendants, by the voluntary act of the plaintiff, operated as a discharge of the sureties to the *replevin* bond.

But we think it clear, that the omission of the defendants to revive the suit against Campbell's personal representative, cannot be treated as equivalent to a voluntary discharge, by the defendants, of Campbell's legal liability.

It is certainly true, that any act on the part of the defendants, amounting to a voluntary release or relinquishment of the legal liability of either party, would have had the effect of discharging the surety to the injunction bond. But nothing of the sort was done. The defendants *might* for their greater security, have revived the suit against Campbell's representative ; but we are not aware that the law imposed any active duty or obligation upon them to do so. All that can be said is, that they omitted to do what they might have done, but were not required as a legal duty, to do.

We have found no principle, nor adjudicated case, which makes such an omission, or passive neglect, a ground for re-

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lieving a surety from the liability imposed upon him by law. On principle, it would seem, that it can form no ground of discharge. The undertaking of the surety, in such a case, must be regarded in law, as for both principals, *severally*, as well as *jointly* : That is, the surety is bound, in effect, that each and all of his principals shall perform and fulfill whatever decree may be rendered in the cause against all, or either of them. If this be so, it follows, that the abatement of a suit in equity, as to one of several joint plaintiffs, by the neglect of both parties to revive ; or the discharge of one, upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties, against whom a final decree may have been properly rendered.

The act of 1789, limiting the time for bringing suits against the representatives of deceased persons, has no application to this case. The representative of Campbell's estate, is not a party to this suit ; and the plaintiff in error, as Campbell's surety, has nothing to do, at present, with the question, whether or not his estate is protected by the act of 1789. If the fact were so, it would constitute no defence for the surety. It is well settled, however, by the course of decision in this State, that, as between the plaintiff in error and Campbell's representative, the right of action of the former, as surety, for reimbursement, arises upon his being compelled to pay the money for the principal.

Judgment affirmed.

JOHN AND JAMES P. BURK v. THE BANK OF TENNESSEE, FOR
THE USE OF WILLIAM BONNER.

1. **BILLS AND NOTES.** *Endorsement of. Parties to suit on.* The endorser of a note may sue the maker in his own name, or in the name of the payee, for his use and benefit.

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2. **REDEMPTION.** *Deed to purchaser. Possession. Rents.* The purchaser of land subject to redemption, can obtain a deed and take possession of the land so as to receive the rents and profits, in the event the land should not be redeemed.
3. **SAME.** *Rents. Debtor remaining in possession.* Instead of ousting the debtor, the purchaser may receive him as his tenant thereby making the possession of the land his own and collect rents from him; and if the debtor fails to redeem, all right to a reclamation of the rents is forever gone.
4. **SAME.** *Same. Possession. Question reserved.* If the purchaser of land, subject to redemption, permit the debtor to remain in possession, after his purchase, without any contract for rent, and the land is not redeemed, has he any remedy, either under the act of 1850, ch. 121, or the law anterior thereto, for the *mesne* profits accruing in the intermediate time?
5. **SAME.** *Same. Which creditor entitled to rents. Question reserved.* Is the purchaser, who obtains possession of land subject to redemption, entitled to retain the rents accruing during his ownership; and, also, to have his bid and interest from the redeeming creditor; or is he bound to yield the rents to the redeeming creditor?

FROM LINCOLN.

Tried at the March Term, 1859, MARCHBANKS, J., presiding.

KERCHEVAL, for the plaintiff in error.

BRIGHT, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

The note upon which the suit is brought, is made payable to the President and Directors of the Branch Bank of Tennessee, at Shelbyville, and the suit is in the name of the principal Bank, for the use of William Bonner. The first objection taken to the judgment, is, that the suit should have been in the name of Bonner—in whom, it is said, the *legal title* is. This objection has nothing in it. It is based upon the fact, that the note appears to be endorsed to Bonner, in the name of J. J. Jones, as agent of the Bank. Without considering

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whether this endorsement had, in law, the effect of placing the legal title in Bonner—it is enough to say—that conceding this to be so—he might still sue in the name of the bank, for his benefit. *Trezevant v. McNeal*. 2 Hum., 352.

The note was given for the rent of a tract of land—which once belonged to the defendant, John Burk. This land was sold, on the 17th of December, 1855, under a deed of trust—executed by him to John S. Fulton and purchased by Goodrich, and redeemed from him by the Bank of Tennessee, and from it by Bonner. These proceedings were all regular. While the Bank was the owner of the land, Burk, rather than be turned out of possession—yielded to pay rent and become the tenant of the Bank, and while thus in possession executed the note, and remained in the use and occupation of the land until the time of redemption expired—but never redeemed it. Upon these facts, the Circuit Judge instructed the jury in favor of the plaintiff. This was proper. Without considering the question whether, if the purchaser allow the debtor to remain in possession of the land—after his purchase, without any contract for rent, and the land be not redeemed—he has any remedy for the mesne profits accruing the intermediate time, in any form of action—either, under the force of the act of 1850, ch. 121, or of the law anterior thereto—it is sufficient to say, that undoubtedly, he is authorised to obtain a deed and to take possession of the land—so as to receive the rents and profits in the event the land should never be redeemed, as a recompense for the use of his money ; and that, instead of ousting the debtor, he may receive him as his tenant—thereby making the possession of the land his own—and may collect rents from him, and if he fail to redeem the land—all right to a reclamation of the rents is forever gone. If this were not so, he might—in the event of no redemption—be wholly deprived of the use of his money for two years. *Odonnell v. McMurdie*, 6 Hum., 134—*Kannon v. Pillow*, 7 Hum., 281.

We take it, the Bank was the owner of the land and entitled to the rents during the period embraced by the note—

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not only because the jury, under a proper charge, here so found—but because the note bears date the 6th of February, 1857, and the assignment to Bonner was not made until the 1st of January, 1858. But, if this were not so—it is entirely a question between the Bank and Bonner, and with which Burk, the debtor, can have no concern—for having failed to redeem the land—his right to demand the rents never existed. They belonged—either to the Bank, or Bonner—and whichever way we take it—the defendants were bound to pay the note, and are protected by the recovery.

It does not appear in this record—in what manner these rents were settled between Bonner and the Bank, nor upon what consideration he became possessed of this note—whether upon the principle that the Bank—as the purchaser of the land—was entitled, upon the redemption by Bonner, to retain the rents during its period of ownership, and also to have its bid and interest; or was bound to yield the rents to him, as a redeeming creditor. If there be any thing in this question—arising under the act of 1850—we do not decide it—as there is no issue between the Bank and Bonner—and as before remarked—it is a matter with which the defendants can have nothing to do.

It is enough here, that we are satisfied Bonner is entitled to a recovery upon this note—either, because, in virtue of his redemption he acquired a right to the rents secured in it—the time of his redemption does not appear, or by purchase, or in some way satisfactory to the Bank; and which it is not our province, as this record comes to us to scrutinise, became its owner; and the defendants, because of the failure of John Burk to redeem, can have no defence against it; the act of 1850, in such a case, giving him no right to the rents.

Affirm the judgment.

JOSEPH BLACKBURN v. THE STATE.

1. **CONSTITUTIONAL LAW.** *Officer de facto. Pro tem appointment of Judge.*
The constitution requires a Circuit Judge to be *thirty* years of age. But, if the appointing power confers the office upon one who is not competent by that test, he may be removed from the office and his powers terminated by a proper preceeding ; but, until that is done, his acts are binding.
2. **SAME.** *Same. Same.* In such a case the appointee is an *officer de facto*, and his official acts are binding and valid. The competency of such officer, acting under a commission, cannot be enquired into by the parties affected by his acts.

FROM DE KALB.

Demurrer to the plea of defendant, sustained by Judge FITE.
He appealed.

M. M. BRIEN, for the plaintiff in error.

HEAD, Attorney General, for the State.

CARUTHERS, J., delivered the opinion of the Court.

The plaintiff in error was presented for unlawful gaming, at the October Term of the Circuit Court of DeKalb, for 1858. That term of the court was held by John P. Murry, who had been appointed by the Governor to fill the vacancy occasioned by the death of the Honorable John L. Goodall, until the election was made by the people. At the February Term, 1859, upon his arraignment he filed a plea in abatement, that the said John P. Murry, who presided at the term of the court at which he was presented under the *pro tem.* appointment of the Governor, was under thirty years of age, and therefore not competent to exercise the functions of a Judge of the Circuit Courts, in this State. A demurrer to this plea was sustained by the court, and that is the error assigned for reversal.

It is true the constitution requires a Circuit Judge to be thirty years of age. But if the appointing power confers the

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office upon one who is not competent, by that test the question is as to the effect upon his judgments, while he occupies and acts in the position. We think it is well settled that the judgments and official acts of an officer, *de facto*, are binding and valid, and the competency of the functionary acting under commission cannot be enquired into by parties affected by them. This principle was adopted through necessity to save the rights of persons having an interest in them, and to prevent a failure of justice. The doctrine is referred to and recognized in *Moore v. The State*, 5 Sneed, 514, and an unreported case at the last term here, and is more fully discussed in a case decided at the last term at Jackson, yet in manuscript. This renders it unnecessary, if not improper, to enter again into the argument and citation of authorities. The Governor's commission renders the functionary competent, and clothes him with powers of the office so far as his official acts are brought in question, by the parties concerned in, or affected by them. He may be removed from the office, and his powers terminated by the proper proceedings, but until that is done, his acts are binding.

The presentment was made at a term held by Judge Murry, but the arraignment and plea was at the next term, before Judge Fite, who had been regularly elected and commissioned Judge of that Circuit.

We think the judgment sustaining the demurrer was right, and it is affirmed.

Jacob Latimer *et al.* v. Mary Rogers.

JACOB LATIMER *et al.* v. MARY ROGERS.

1. **DESCENT AND DISTRIBUTION.** *As between an uncle and aunt, and grandmother.* The maternal grandmother of a person dying intestate, without issue, as next of kin, succeeds to the personal estate, in preference to the paternal uncle and aunt. But the paternal uncle and aunt, in preference to the grandmother, succeed to the real estate if inherited from the paternal ancestor of the intestate.
2. **PARTITION.** *Cannot be set aside by adults. Fraud. Feme covert.* If a petition is presented by adults for a partition of lands, in which minors are interested, praying for a division in a certain manner; and the partition is made in conformity to their wishes, they cannot be heard to object to it, although, as to the minors, it may be void, and would be set aside upon their application. And if the object in setting aside said partition, is to defeat the succession of the next of kin of the infants, it would be a gross fraud; and would not be permitted even in favor of a complainant who is a *feme covert*.

FROM SUMNER.

Bill dismissed by Chancellor RIDLEY. The complainants appealed.

HEAD & TURNER, for the complainants.

G. W. ALLEN, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This case involves a question in regard to the right of succession to the joint estate of William and George Latimer, deceased.

The facts are these: Jacob Latimer died intestate, in the year 1854. He was the owner, at his death, of several tracts of land, and eight slaves, besides other personal property. He left surviving him two children—the complainants—

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Richard Latimer and Caroline Brinkley; and two grandchildren, William and George Latimer, who are now dead, as his heirs at law.

In 1855, a petition was presented to the circuit court of Sumner, in the names of all the heirs above named (the two grandchildren being minors,) asking the partition of the real estate, and division of the slaves amongst them in severalty. In said petition it was specifically prayed, that certain definite portions of the lands designated in the petition, should, for reasons therein stated, be set apart and allotted to each of said heirs. Commissioners were appointed, and the lands were partitioned and allotted according to the prayer of the petition. Division was likewise made of the slaves. No exception was taken to the report of the commissioners, either by the adult parties, or the guardian of the minors; and it was confirmed by the court at the February term, 1856, and a final decree, divesting and vesting title in the several parties, was accordingly entered.

In conforming to the prayer of the petition, the commissioners necessarily made an *unequal* partition of the lands. The part of the lands allotted to the two minor grandchildren was valued at \$626.00, and their share of the slaves at \$2470.00. The part of the lands given to Mrs. Brinkley, was estimated at \$2670.00, and her share of the slaves at \$850.00. The part of the lands given to Richard Latimer was valued at \$2000.00, and his share in the slaves at \$1100.00.

In 1859, said two grandchildren, William and George Latimer, both died intestate, during their minority, without issue, leaving neither parents, nor brother nor sister, surviving them; their only surviving heirs and next of kin, being the complainants, Richard Latimer, and Mrs. Brinkley—their paternal uncle and aunt—and the defendant, Mrs. Rogers—their maternal grandmother.

Upon this state of facts, it is clear that the grandmother, as next of kin, succeeds to the personal estate; and it is equally clear that the collateral relations—the paternal uncle

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and aunt—succeeded to the real estate, it having been inherited from the paternal ancestor of the intestates.

This seems not to be controverted. But it is insisted that the partition of the real estate was illegal, and void, as against the two minor heirs, on the ground that the commissioners had no power, under the circumstances, to make an *unequal* partition of the real estate; that the value of the equal share of the minors in the lands was \$1765.33, and the value of the share laid off to them, was only \$626.00—falling below the value of their share the sum of \$1139.33. And it is insisted that the complainants are entitled to take from the defendant, as the next of kin, a portion of the slaves assigned to said minors, or the value in money, equal to the deficit of \$1139.33, in the value of the land allotted to them.

The draftsman of the bill seems to have been at a loss for some legal ground on which to base this claim, and this difficulty was no less felt in the argument.

It seems to be thought, however, that the bill may be maintained on the ground, that the partition, being illegal, was not a *conversion* of the real estate of the infants; and that the slaves assigned to them, instead of land, are to be treated as impressed with the character of real estate, and must, therefore, descend, as such, to the complainants, as the heirs at law.

This reasoning is not very intelligible to us; and it is not necessary that we should trouble ourselves in trying to comprehend it. In our view, there is no foundation for the relief sought by the bill.

The minors, if living, might well be heard to complain of the partition; because, even under the act of 1854, ch. 48, sec. 4, no case is made out for an unequal division of the land; and because, being infants, they would not, under the circumstances, be bound by the assent of their guardian to the proceedings. But it does not lie in the mouths of the complainants, to object to the partition; it was made in exact conformity to their wishes; in the very manner in which they asked to have it made; and it was so made as, in its

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results, to do full justice, perhaps more than *justice*, to them—as between them and the infants. The complainants are, therefore, concluded by it. To permit them to disturb the partition, after the death of the infants, would scarcely be allowable for any purpose; and least of all, for the purpose of enabling them to perpetrate a gross fraud upon the rights of the next of kin of the deceased infants. It matters not that one of the complainants is a *feme covert*—*fraud* is not among the privileges of that class of persons.

Decree affirmed, with costs.

L. C. BROWN v. JOHN GREER.

1. **TAXATION.** *Constitutional law.* By the Constitution, Art. 2, sections 28, 29, all property shall be taxed according to *its value*. There are no other limitations or restrictions in the Constitution upon the power of the Legislature.
2. **SAME.** *Duty of assessors.* All property should be assessed at its fair value, to be determined by the ordinary selling and buying prices for cash, at the time the assessment takes effect. To place it any lower than this standard is a palpable dereliction of duty by the assessors, and an infringement upon their oath.
3. **SAME.** *Where slaves to be assessed.* Code, § 563. Slaves are to be assessed to the owner in the county where he resides, whether in his possession or not; and whether in the *same county or not*. But the owner cannot be required to pay taxes on them in but *one* county.

FROM DAVIDSON.

Agreed case before Judge BAXTER, at the September Term, 1859.

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W. F. COOPER, for Mrs. Brown.

N. S. BROWN, for Greer.

CARUTHERS, J., delivered the opinion of the Court.

This was an agreed case between Greer, as collector of the taxes in Davidson county, and Mrs. Brown, a tax payer. The facts agreed are, that Mrs. Brown is "a resident citizen of Davidson, having her domicile at Nashville;" that she is the owner of a plantation in Maury county, near Springhill, upon which she has a large number of slaves, permanently employed, which are subject to taxation by the revenue laws of the State. She has upon the place a family residence, furnished, at which she frequently spends a few days or weeks at a time, with her family. The assessor for Davidson required that she should give in these slaves for taxation in Davidson county, which she did under protest. She is also required to pay taxes upon the same slaves in the county of Maury. And the question is, under these facts, whether the taxes should be paid in Maury or Davidson.

There is nothing in sections 28 and 29 of the 2d art. of the Constitution, that affects the question, as is insisted in argument. Those sections place no limitations or restrictions upon the power of the Legislature, except that all *property* shall be taxed according to *its value*, and "that the same shall be equal and uniform throughout the State." The authority given to the Legislature to delegate the taxing power to counties and towns, in the 29th section, for county and town purposes, is general, and unconfined, except that they shall tax according to value.

It may not be amiss to make a single remark here, as to the duty of assessors, in view of this provision in the Constitution, and the acts of Assembly under it. The Constitution and statutes, to which the assessors *are sworn* to conform, (Code 559,) require that "property should be taxed according to *its value*." (Code 564, 565.) In this case, from the description of slaves, it is clear that they are not assessed

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at much more than half their cash value. This is a great abuse, and ought to be reformed. All property ought to be assessed at its fair value, and that can only be determined by the ordinary selling and buying prices for cash, at the time. To place it any lower than this standard is a palpable dereliction of duty on the part of those whose duty it is made by law to value it, and it is difficult to see how the district or town assessors can reconcile their practice in this respect to their duty, enforced by a solemn oath. Code, 559. The fault is not that of the tax payer, but of the tax assessor; as it is not the duty of the former, but the latter, to fix the value of property.

But the question in this case, and it is one of general interest, is as to the county in which slaves shall be given in for taxes. This is of no consequence as to the State revenue, but is important as to county taxes. We have seen that it is entirely a legislative question. It must then depend upon the statute on that subject. It is to be found in the Code, sec. 563, sub-division 3; "Slaves shall be assessed to the owner in the county where he resides, whether in his possession or not, and *whether in the same county or not*. If hired out in another, they shall be assessed to the hirer for the amount of the hire, and if the owner lives in another State, then they shall be assessed to the hirer at their value."

The argument against the propriety and policy of this provision, as to slaves employed by the owner in another county permanently, is conclusive. The owner certainly ought to pay taxes for them in the county where they are located and protected. But such is not the statute. We cannot make legislation conform to our views of what it should be, where there is no ambiguity. It ought to be changed, and unquestionably would be, if brought to the notice of the Legislature. The clause in relation to slaves hired out of the county of the owner, is entirely unintelligible to us, and ought also to be explained by the Legislature. But we need not now perplex ourselves with an attempt to construe it, as this is not a case of hiring.

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Our conclusion is, with the court below, upon the agreed case, that Mrs. Brown is bound to pay the taxes upon the value of her slaves employed on her farm in Maury county, to the collector of taxes in the county of Davidson. It follows, of course, that she cannot, also, be required to pay for them in the county of Maury.

So the judgment will be affirmed.

BENJ. ELLIOTT AND WIFE v. JOSEPH HOLDER, ADM'R, *et al.*

1. **STATUTE OF LIMITATIONS. Possession. Presumption. Slaves.** If a distributee receive slaves from the administrator, as the joint property of himself and another distributee, the law presumes that he continued to hold them in the same right, and such possession would not be adverse.
2. **SAME. Same. Same. Evidence to remove presumption. Onus of proof.** To displace this presumption, the fact must be affirmatively proved, by clear and convincing evidence, not merely that he held the possession for himself, and adversely to his co-tenant, for the length of time required to give title by the statute; but, in addition, that his co-tenant had full knowledge of such adverse claim and holding during all that period of time.
3. **Administration. Slaves pass to distributees.** The title to slaves of an intestate passes directly to the distributees, subject to the trust in the personal representative, in behalf of the estate and of creditors; and as between themselves, and as against all others except creditors of the estate, the title of the distributees is complete without the assent of the administrator.
4. **SAME. Same. Parties.** In a proceeding for division of slaves between distributees, there is no necessity for an administrator of the

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estate being before the court, unless there are some matters of equity to be adjusted between the estate and the parties to the suit.

FROM FRANKLIN.

This cause was heard at the November Term, 1859. RINLEY, Chancellor presiding.

P. TURNEY, for the complainants.

ESTELL & COLYAR, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This bill was filed to recover the wife's distributive share of certain slaves, alleged to have been the property of Banks B. Gover, the former husband of the complainant, Elizabeth. Said Gover died intestate, in Alabama, upwards of twenty years ago, leaving his widow (complainant Elizabeth) and two children, Anthony and Samuel Gover, surviving him. Anthony Gover died, intestate, and without issue, several years ago. Samuel Gover died in 1857.

On the death of Banks B. Gover, his father, Samuel Gover, became administrator of his estate. And with the money of the estate, he purchased a female slave named Evaline, for the benefit of the widow and children of his deceased son's estate. The administrator retained said slave in his possession, in Alabama, until the early part of the year 1854, during which time she gave birth to several children. At the period stated, the slaves were brought to Tennessee, at the request of the administrator, by Samuel Gover, the surviving son of Banks B. Gover, who placed one of them in the possession of the complainants, and retained the others in his own possession up to the time of his death—a period of more than three years.

The proof sufficiently establishes, that said slaves were held by the administrator, as the property of the estate of Banks B.

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Gover, up to 1854. It is also proved that Samuel Gover, one of the distributees, received them into his possession, from the administrator, and brought them to Tennessee, as the property of said estate. There is evidence tending to show that Samuel Gover, after the slaves were brought to this State, entertained the purpose of excluding his mother (the complainant Elizabeth) from sharing with him in the division. But there is no such evidence of an exclusive, adverse claim to the slaves, continued for the period of three years, and known to his co-tenant, as would vest a title in him, under the statute of limitations. This ground of defence is wholly untenable. Having received the slaves into his possession, as the joint property of himself and the complainant, Elizabeth, the law presumes that he continued to hold them as such. And to displace this presumption, the fact must be affirmatively proved, by clear and convincing evidence, not merely that he held the possession for himself, and adversely to his co-tenant, for the length of time required to give title by the statute; but, in addition, that his co-tenant had full knowledge of such adverse claim and holding, during all that period of time. The defence of the statute of limitations, in such a case, standing directly opposed to the presumption of law, is not to be allowed, except upon the most satisfactory proof of the facts before stated; and the burden of proof is on the party setting up this defence.

The fact that the interest of the estate of Anthony Gover is not represented—no administrator having been appointed thereon—interposes no obstacle to the determination of the case.

The principle being established that, in the present state of the law, in case of a person dying intestate, the title to slaves passes directly to the distributees, subject to the trust in the personal representative, in behalf of the estate, and of creditors, it necessarily results, that, as between themselves, and as against all others, except creditors of the estate, the title of the distributees must be regarded as complete, without the assent of the administrator. Hence, it is clear that, on the

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death of Anthony Gover, intestate, and without issue, his interest in the slaves vested immediately in his mother and surviving brother, under the statute of distributions ; and in a bill for division of the slaves between them, there is no necessity for an administrator of Anthony Gover's estate being before the court ; inasmuch as it is not alleged that there are any matters of equity to be adjusted between his estate and the parties to this suit.

There is no error in the decree, and it will be affirmed.

THE SEWANEE MINING COMPANY v. E. L. BEST & Co., FOR
THE USE OF PETER BEST & BROTHER.

1. EVIDENCE. *Nominal party competent as a witness.* Code, § 8810. By the Code, sec. 8810, a nominal party to the record is made a competent witness. But if incompetent on other grounds, such as interest, &c., his testimony would not be admissible.
2. SAME. *Same. Receipt.* A receipt given by a party who has no agency or power in the matter, is, with the acceptance of the money by the person entitled thereto, competent evidence of the payment of the same; but an admission in the receipt that it was in full to date, is not admissible and binding upon the party.
3. JURISDICTION. *Circuit and Chancery Court.* Code, § 4286. Section 4236 of the Code does not embrace cases where the Circuit and Chancery Court have concurrent jurisdiction ; but suits instituted in a court of law which are properly cognizable in a court of equity, and the defendant fails to demur.
4. SAME. *Same. Same.* In such cases, the plaintiff's suit will not be dismissed ; but the Circuit Judge may, at his discretion, transfer the cause to the Chancery Court ; or retain and determine it upon the principles of equity ; order an account and otherwise perform the functions of a Chancellor.

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5. **CHARGE TO THE JURY.** *Questions of science. Instructions asked.* There is no rule of law by which the Judge in his instructions to the jury would be required to settle questions of science, so as to put him in error for failing to do so. But if such a rule did exist, a party could not have the advantage of the objection unless he had requested a charge on that point.

FROM FRANKLIN.

This cause was tried at the April Term, 1859, before His Honor, Judge MARCHBANKS.

MEIGS and P. TURNEY, for the plaintiff in error.

COLYAR and HICKERSON, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

This is an action brought for work done on the defendant's railroad and for damages for being ejected from the work. The plaintiff's claim \$15,000, and recoverer, \$3,508.93½. The defendant prosecutes this writ of error to reverse on several grounds.

1. "E. L. Best was illegally admitted as a witness." He is a nominal party to the record; but the Code, sec. 3810, removes that objection to his competency. But still if he be inadmissible on other grounds, according to the rules of evidence, such as interest, he cannot be a witness. The Code only removes the single objection, of being a "nominal party to the record," which before that provision, by a technical rule, excluded him. So if he were interested, in the event, or was in a position in connection with the matter that might in some event give him a benefit, or impose upon him a liability in relation to the subject of the suit, that would render him incompetent. The question arose upon a proposition of defendants to prove the declarations and acts of E. L. Best, to affect the plaintiffs, upon the ground that he was a partner, or concerned with them. He was then allowed to be examined to show

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that he never was a partner, nor had he at any time been interested in the contract : That he signed the bid for the work at the request of the company's agent, Backus, for his brothers, with an explicit understanding that he was to have nothing to do with it, as he had as much on his hands as he could manage. Upon this state of facts the court excluded his acts, and declarations, except so far as he assumed an agency in making the contract, or did other acts which his brothers ratified, and thereby became bound by them. He was allowed to be examined at large by either party. We can see nothing in the facts to render him inadmissible as a witness. Some loose statements of his in which he coupled himself with his brothers in speaking of this contract are not sufficient to overthrow his direct denial on oath, and other proof on the point.

2. There was a receipt for \$510 signed by E. L. Best offered under the plea of payment, which wound up with an acknowledgment that that sum was in full up to a certain date. The court excluded the latter clause upon the ground that it did not appear that E. L. Best had any authority to make admissions in writing or otherwise, to bind his brothers. This is called a mutilation of the writing. We see no error in that. The receipt for the money was, with the acceptance of plaintiffs, proper evidence of that payment ; but the admission that no more was due, though on the same paper, should have been excluded, unless power to make it was first shown, or subsequent sanction proved.

3. The court refused after the trial had considerably progressed, upon motion, to take the case from the jury, and refer it to the clerk, or a commissioner to state the account, under section 4236 of the Code. We do not understand that provision to have any application to a case like this. That covers cases where a suit is brought in a court of law, which from its nature and character, is properly cognizable in a court of equity, and the defendant fails to demur. In such a case the plaintiff shall not be denied the relief to which he is entitled upon the merits of his case, by the dismissal of his

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suit with costs ; but the Circuit Judge, *may, at his discretion*, transfer the case to the Chancery Court, or retain it in his own court, and determine it upon the principles of equity, order all proper accounts, and otherwise exercise the functions of a Chancellor in relation to the case. But that does not mean that in a case of a simple legal character like this, the circuit court may assume the functions of a court of equity, because some equitable defence is set up, or a case is developed in the proof, of which a court of equity might have exercised a concurrent jurisdiction, if that forum had been selected in the first instance. In such a case, the same general principle would apply since, as well as before the Code, that the tribunal first taking jurisdiction should retain it. This was a complicated account, and on that ground, perhaps, may have been appropriate to a court of equity ; but a court of law was also competent to try it, and having obtained jurisdiction of the case, should have retained and finished it, as it did. The conflicting evidence on the proper mode of measurement of the work did not, of itself, create a case for equitable cognizance. It was a case where damages were claimed, on both sides, for reciprocal breaches of contract, and where it was necessary to pass upon the credit of different witnesses, and was therefore peculiarly adapted to a jury, and a court of law. Such being the true construction, as we think, of this new provision in our law, we think the court did not err in refusing this motion. This is not the kind of case, in any aspect, to which the Code applies.

4. The last error assigned, is, that the court should have instructed the jury as to the proper mode of measurement, to ascertain the quantities of railroad excavations and embankments, and that it was illegal to leave the same to the discretion of the jury. There were two engineers examined, who adopted different modes, or rules of measurement, and made a considerable difference in the quantity of work. The court left it to the jury to determine which was right. The one calculated by the average of the end areas, and the other made

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his calculations by what is called the "prismoidal formula." His Honor, in his charge, did not decide between them, but left the jury to determine the quantity of work by weighing the statements and reasons given by each for the accuracy of their respective measurements. We are not aware of any rule of law by which the Judge, in his instruction to the jury, would be required to settle such questions of science, so as to put him in error for failing to do so. But if such a rule existed, the defendant could not have the advantage of the objection, unless he had requested a charge on that point, which was not done.

Sundry affidavits were read on the motion for a new trial. We think they did not make out a sufficient case. The facts stated as to the proof that could be made on another trial, are all cumulative, and for that reason, together with the negligence in not having the witnesses at the trial, authorized the refusal of a new trial on that ground.

We think there is nothing in the assignment of errors, or in the record, that would entitle defendants to a new trial. Injustice may have been done, but we see no way to remedy it, if it be so, of which we are by no means certain.

The judgment is therefore affirmed.

LEWIS G. AND B. W. MILLS, ADM'RS, &c., v. JAMES T. MILLS *et al.*, AND H. S. YOUNG v. MARTHA A. ROBERSON *et al.*

1. **DEED.** *Settlement by party on a trustee for himself and family.* A party owning property may convey the same to a trustee, to hold in trust for the support of himself and family during life, with remainder to his children. A court of chancery will sustain such a deed with the conditions and limitations therein contained.
2. **SAME.** *Same. Payment of debts.* If so provided in the deed, the

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property or funds conveyed cannot be applied to the payment of any debt contracted by the maker of the deed, after its execution.

8. **SAME. Same. Subsequent deed. County Court.** A subsequent deed, disposing of the property thus conveyed, or an order of the County Court, annulling the first deed, would be inoperative and void.
4. **LEGACY. Interest on.** A legacy given *generally* out of the personal estate, without the specification of any time of payment by the testator, bears interest from the expiration of one year next after his death. The executor is allowed that time for the collection of the effects.
5. **SAME. Same.** A legacy severed from the rest of the testator's estate, and specifically appropriated for the benefit of the legatee, bears interest from his death.
6. **SAME. Same.** A legacy charged on lands yielding immediate profits, or given out of a personal estate bearing interest or yielding dividends, will carry interest from the death of the testator.
7. **INTEREST. When allowed on fund due by compromise.** A fund agreed to be paid upon the compromise of a suit, is admitted to be a debt; and, as a legal consequence, bears interest from the date of the compromise, unless otherwise provided.
8. **SAME. Same. How computed.** When payments have been made, or debts taken in by the executors or party indebted on the compromise, interest shall be computed according to the rule in case of partial payments, so that the payments shall be first applied in discharge of the interest.
9. **FRAUDS, STATUTE OF. Promise to pay the debt of another. New consideration.** When the promise to pay the debt of another arises out of some new and original consideration of benefit, or harm, moving between the newly contracting parties it is not a case within the statute of frauds, and need not be in writing.
10. **SAME. Same. Effect of answer in chancery.** If a guarantee, within the statute of frauds, is acknowledged and relied on as a defence, by the party making it, in an answer in chancery, the want of a promise in writing is obviated by the statements in the answer.

FROM MACON.

The facts are sufficiently stated in the opinion. Decree pronounced by Chancellor RIDLEY, from which Jas. T. Mills' trustee and Mrs. Roberson appealed.

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GUILD and DEWITT, for the Administrators and Young.

HEAD & TURNER, for the Trustee and Mrs. Roberson.

WRIGHT, J., delivered the opinion of the Court.

It is not denied that James T. Mills, though of weak intellect, was competent to make the deed, dated the 18th of March, 1856, to Peter A. Wilkinson ; and that the same was, in all respects, proper, and such a deed as he should have made. Neither is it controverted that the action of the county court, in afterwards attempting to vacate this deed, was without authority and void, and that the same remains in full force. A question is made as to the construction of this deed, and upon this, we are of opinion, looking to the entire instrument, that Peter A. Wilkinson, by its terms, became invested with the share of James T. Mills in the estate of his grandfather, John Mills, consisting of a \$200.00 legacy under his will, \$1000.00 agreed to be paid him in the compromise of the contested will suit in the circuit court of Sumner county, upon his grandfather's will, and any other interest he might have in that estate, in trust: 1st—to pay the attorneys' fees of the said James T. Mills, in the suit aforesaid, and any other debts he then owed, unless otherwise paid ; secondly—to hold the residue of said fund for the support of the said James T., and his family, during his natural life, with remainder, at his death, to his children, the share of any deceased child to go to its children. The trustee has power to vest the fund in a tract of land or slaves, and again to sell and re-invest, or loan the proceeds at interest, to the same uses and trusts as the original fund. He may permit the said James T. and family, to remain in possession of the property so purchased, or not, at his discretion, and shall apply the interest on the money, or the issues and profits of the land, or the hire of the slaves, as the case may be, to their support during the natural life of the said James T. ; but he is prohibited from applying the interest or money,

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the issues and profits of land, or the hires of slaves to the payment of any debt, or contract made by the said James T., after that date, unless it be for the necessary support of himself or his wife and children ; and the body of the fund itself, or the property purchased therewith, cannot be applied to the payment of any debts, or engagements of the said James T., made after the execution of said deed, unless they be authorized to be contracted by the trustee, and be also for the necessary support of the said James T.

This, we think, is the true meaning of the deed. His purpose, to use his own language, was to secure the fund against being spent either by himself or others.

The result is, that the *body of the fund, or property itself*, cannot be applied to any debt of the said James T., contracted after the making of the deed, being satisfied as we are, that the trustee never, at any time, gave his sanction to any of said debts. Neither can the *interest, rents, or hires* be applied to any such debts, unless shown to have been for the necessary support of the said James T., or his wife and children.

It follows, also, that the deed subsequently, and on the 9th of January, 1857, made of this same fund, by James T. Mills to Haley S. Young, was inoperative and void, as against the previous conveyance made by him to Wilkinson, in trust for his wife and children ; and the more especially so, as the said Young had notice of the prior deed.

As to interest on the \$200.00 legacy, neither the will or the compromise are filed, and there is nothing to show its exact nature. We must take it, therefore, to be a legacy given *generally* out of the personal estate, without the specification of any time of payment by the testator, in which case the rule is that it shall carry interest only from the expiration of the year next after his decease ; the executor being necessarily allowed that time for the collecting of the effects. Interest on a *specific* legacy, where it produces interest, shall be computed from the time of the testator's

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death. It is severed from the rest of his estate, and specifically appropriated for the benefit of the legatee, and shall, therefore, carry interest immediately. There are other cases where a legacy, without any time of payment mentioned, charged on lands yielding immediate profits, or given out of a *personal estate* carrying interest or producing dividends, has been allowed to carry interest from the death of the testator. But, as before remarked, we have nothing to bring this legacy within these favored rules. Martin on Executors, 211, 212; Toller, 323; 1 McCord's Ch. R., 94, 99, 148, 152. Neither does the circumstance of his being a grandchild, as would be the case if he were a child, as it seems, change the rule. Martin, 214; 3 Ves. Jr., 12; 2 Johns. Ch. R., 628.

We also think the \$1000.00, due under the compromise, should carry interest from its date. It is admitted to be a debt at that time, and, as a legal consequence, bears interest, unless there be something in the terms of the contract to prevent it; and if this be so, it should have been shown by those who resist the interest. This is not done.

In the settlement of the share of James T. Mills in the estate of his grandfather, with the trustee, under the deed of the 18th of March, 1856, the administrators of John Mills should be allowed credit for the payment of any debts properly chargeable upon the trust fund; but not for payments made to James T. Mills himself, unless shown to have been legally applied in exoneration of the trust estate. In like manner, so far as H. S. Young may have contributed to discharge any such debts, he will be substituted to the shoes of the respective creditors, as against the trust fund.

The interest shall be computed according to the rule in the case of partial payments, so that the payment shall be first applied in discharge of the interest, and the balance in discharge of the principal, where it is allowable to encroach upon the latter. 1 Meigs' Dig., 623-4.

The attorneys' fees and debts against James T. Mills at the execution of the deed of trust, should come first out of

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the interest of the trust fund, and then from the principal ; and the net balance will constitute the body of the fund, not to be diminished, and out of the interest of which the debt for the necessary support of the family of James T. Mills must be paid.

So far as H. S. Young may not be re-imbursed, for money paid by him to James T. Mills, or Martha A. Roberson, upon the purchase of the 9th of January, 1857, either out of the trust fund, or by re-payment to him by her, we are of opinion they are jointly liable to him. It appears that, notwithstanding James T. Mills had parted with all title to the claim of the \$1000.00 by the deed to Wilkinson, he sold it to Young for \$800.00, \$47.70 of which he paid in a debt he held on said James T. ; \$252.30 of it in costs, and for the residue, he gave his two notes of \$250.00 each, due, one the first of July, 1857, and the other, the first of March, 1858, which the said James T. immediately endorsed and delivered to his mother, the said Martha A., with power to turn the same into money, and relieve herself from a liability as his stayor, in a debt of about \$80.00. She was also anxious to get possession of the notes and the money upon them, lest they might be wasted through the improvidence of her son ; believing, as she did, that the decree of the county court had annulled the deed to Wilkinson.

James T. Mills, when he sold Young the claim of \$1000.00, had given him a guarantee it would be collected and realized by him. This he doubted, because of the previous deed to Wilkinson, having fears as to the power of the county court to annul it. To induce him at once, before the notes matured, to pay her, she agreed to, and did, receive of him \$325.00, and surrendered to him the notes, giving him at the same time her guarantee that he should realize from the claim so sold him by James T. Mills, the sum of \$920.00. We are unable to see that she did not become bound upon this guarantee.

The case is not affected by the statute of frauds and

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perjuries, and the promise need not be in writing. Where the promise to pay the debt of another—if this were a case of that sort—arises out of some new and original consideration of benefit, or harm, moving between the newly contracting parties, it is not a case within the statute. *Myers v. Morse*, 15 Johns. R., 425 ; Roberts on Frauds, 232 to 239. *Williams v. Leper*, 3 Bur. 1886. Here, Young was not bound to pay these notes, the consideration having entirely failed, by means of the superior title of Wilkinson, the trustee. He had a perfect legal right to withhold the money, which was as much his own as if the trade had never been made, or the notes given. He is induced to yield this right in consideration of the guarantee. It is in principle like *Williams v. Leper*, where a broker, about to sell the goods of an insolvent, promises the landlord to pay him his rent, if he will not distrain, this promise need not be in writing. But if this were not so, the want of a writing is obviated by her having stated in an answer in chancery that she had given the guarantee, and in which she, in effect, insisted the same was valid and binding on her. This answer was to a bill filed by a creditor of James T. Mills, to reach this fund in her hands, and her defence was her superior obligation to Young, upon her guarantee, his title to the claim purchased of James T. Mills, having failed. Roberts on Frauds, 239. It will be seen the guarantee extended beyond the \$325.00, and as to a consideration, if there were nothing else, it was certainly a detriment, or loss to Young to give up the legal right to hold the money. 24 Pick., 221.

We do not consider whether he would have a right, upon the guarantee, to go beyond the sum actually paid, because in his bill, he is content with that ; and such a decree obviously comports with the equity of the case.

Though the attitude of Young is not such as to commend him very strongly to a court of equity, yet we see nothing in his conduct to repel him altogether. Though he knew of the previous deed to Wilkinson, yet he believed, as did

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James T. Mills and his mother, that it had been annulled by the decree of the county court; and she urged him to make the purchase, in the hope of saving her son from the hands of others more grasping. He does not appear to have been guilty of *actual fraud*; and though he took the claim at a ruinous discount, yet the purchase was not usurious; and we know of no rule of equity or policy which will repel him, in such a case, from relief in a court of justice, if his title to the claim fail.

We cannot assume that he was an unlicensed broker, dealing in claims as a *business*; because if a single transaction would fix upon him the *character*—and we have no evidence of any but the one—yet the record being silent as to whether he had license or not, we cannot say he had not; but rather that his acts were consistent with—than against the law.

As to the claim of \$47.70—originally a debt in favor of Young, against James T. Mills—Mary A. Roberson will not be charged with that.

The decree of the Chancellor will be reversed, and the report of the commissioners set aside, and a decree pronounced and an account stated upon the principles of this opinion.

John H. Ewin and Wife v. Park *et al.*

JOHN H. EWIN AND WIFE v. PARK *et al.*

WILL. *Construction of. Limitation over. Trustee.* The testator, after other bequests gave the residue of his estate, real and personal, to his children, Catharine D. J. and Benjamin Russ DeGraffenreid, and directed that if his said son should die without issue, before attaining the age of twenty-one years, that the estate given him, should go to his said daughter, her heirs and representatives. He directed that such part of his personal estate as is given to his daughter, if the same shall not exceed one-half in value of the whole real and personal estate given her should be converted into money by his executors, and the same be paid over to trustees, appointed by a court of chancery, to be by them held in trust, &c. He proceeds to direct the trustees to appropriate the interest upon the fund to the sole and separate use of the said Catharine, &c., and directs that, at her death, the trustees shall "pay, transfer and assign the same to the next of kin of the said Catharine D. J, their heirs, executors, administrators and assigns, according to the statute for the distribution of the effects of persons dying intestate." Held :

1. That the limitation over to Catharine, in the event contemplated by the will, is valid. Consequently, on the death of Benjamin, under the age of twenty-one years, without leaving issue, his entire estate, derived under the will, passed to his sister, Catharine; but the surplus of the income of said fund did not pass to her.
2. That the provision of the will that one half in value of the whole real and personal estate, given by the will to Catharine should be converted into money, and vested in a trustee for her benefit, under the trusts therein declared, applies as well to the contingent, as to the direct, absolute gift.

FROM WILLIAMSON.

EWING & COOPER, for the complainants.

JOHN MARSHALL, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The questions submitted for our determination in this cause

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arise out of certain provisions in the will of Metcalf DeGraffenried, deceased.

Among other clauses in the will, are the following: "I will, devise, give and bequeath all the rest and residue of my estate, both personal and real, to my children, Catharine D. J. and Benjamin Russ De Graffenreid, their heirs, executors and administrators, forever. * * * * Should my said son Benjamin Russ die without leaving issue, before he attains the age of twenty-one years, then it is my will, and I hereby direct, that the estate herein given him, shall revert, return, and go to my said daughter Catharine D. J., her heirs and legal representatives. * * * * I will and direct, that such part of my personal estate as is herein given to my daughter Catharine D. J.—provided the same shall not exceed the one half in value of the whole real and personal estate herein given to her—shall be converted: and it is my will, that such one half shall be converted into money by my executors, and the same be paid over to trustees, to be appointed by a court exercising Chancery jurisdiction, to be by them held upon these trusts," &c. The will proceeds to direct the trustees to appropriate the interest accruing upon the fund, to the sole and separate use of the said Catharine: denies to her all power of disposition of the fund; and directs that at her death, the trustees shall "pay, transfer and assign the same to the next of kin of said Catharine D. J., their heirs, executors, administrators and assigns, according to the statute for the distribution of the effects of persons dying intestate."

It appears that the residue of the testator's estate was divided between his two children, as directed by the will. It also appears that a fund, amounting to \$6,955.67, was by a proper proceeding in chancery, vested in a trustee for the benefit of said Catharine, who is now the wife of the complainant, John H. Ewing. It further appears, that in 1859, said Benjamin Russ died intestate, under the age of twenty-one years, unmarried and without issue: leaving, as his heirs at law, and next of kin, his mother, and his half sister, said

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Catharine D. J. His estate consists of the moiety of the real estate of his father, derived under his will, and \$10,554.23, in money, in the hands of his guardian—being the *principal* of his share in the personal estate of his father, under the will : and the further sum of \$745.11—being a *surplus of the income* accruing from said principal fund remaining undisposed of at the death of said Benjamin.

Upon this state of the case, we are of opinion, first, that the limitation over to Catharine, in the event contemplated by the will, is valid. Consequently, on the death of Benjamin, under the age of twenty-one years, without leaving issue, his entire estate, derived under the will, passed to his sister Catharine : that is to say—his moiety of the real estate, and the principal of his share of the personal estate, being \$10,554.23. But the surplus of the income of said fund, did not pass, under the will, to said Catharine.

The argument is plausible, that the word *estate*, being sufficiently comprehensive to embrace the income of the fund, ought to be so construed, in view of the manifest intention of the testator, that the daughter, upon the son's death, should take every thing given to him by the will. The answer to this is that the word *estate*—although the most comprehensive, perhaps, that could have been used—must be restricted to the subject matter of the gift. The “estate” limited over to the daughter, was the “estate,” as given by the will, to the son : not a greater or different interest : not the subsequent accretions of the estate.

Secondly : We are of opinion, that the provision of the will, requiring that one half in value of the whole real and personal estate given by the will to Catharine should be converted into money, and vested in a trustee for her benefit, under the trusts therein declared—applies as well to the contingent, as to the direct, absolute gift.

The probability that the daughter would succeed to the entire estate, by the death of the son in his minority, without issue, was prominently before the mind of the testator ; and

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in view of that event, he made a contingent gift of the son's portion over to the daughter. And having thus provided for her *possible* ownership of the whole estate, he proceeds to direct, that "one half in value of the whole real and personal estate *herein given to her*," shall be converted into money, and settled upon her, to her separate use.

From this language of the will, and from its manifest scope and intention, we think the testator unquestionably designed, in the event that has happened, that one-half, in value, of the share given over to the daughter, upon the son's death, should be settled upon her, in like manner as provided in regard to the portion given to her, in the first instance, absolutely.

The decree of the Chancellor will be modified accordingly.

FELIX N. GAW v. DAVID A. RAWLEY.

1. **STAY OF EXECUTION.** *Code, § 3065. Additional stayor. Affidavit. Notice.* By sec. 3065 of the Code, the plaintiff may at any time before the expiration of the stay, if he deems his debt in danger, on account of the condition of the stayor, require the defendant to justify or give other security; and if he fail to do so, have execution forthwith. But this requires an affidavit of the plaintiff, and two days' notice to the defendant.
2. **SAME.** *Same. When affidavit essential.* The affidavit is required for the benefit of the defendant, to prevent him from being unnecessarily required to give other stay surety, or justify that already given. But, if he is notified and gives the additional security without requiring the affidavit, the stayor is bound.

FROM JACKSON.

This cause was tried before Judge FITE. The plaintiff appealed.

S. S. STANTON, for the plaintiff.

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LOWE, for the stayor.

CARUTHERS, J., delivered the opinion of the Court.

The defendant upon petition to a Circuit Judge, obtained a supersedeas against an execution issued against him as stayor, for one Carson. The case stated in the petition is this : on the 14th November, 1857, a judgment was rendered by McCrue, a Justice of the Peace of Jackson county, in favor of *Gaw v. Carson* as principal, and Kirkpatrick as surety. Within two days, W. G. Cox become stayor, and afterwards the name of R. A. Cox was entered. Some eight or ten days after the date of the judgment, he states that "he was called upon by some person to become stayor also, and he entered his name accordingly." He says he thought Kirkpatrick, as well as Carson would be bound before him, but he finds that as he did not unite in the request, he is not liable before petitioner. Code, 3061-2

The defendant insists that he is not bound, because he did not enter his name within two days from date of judgment. Code, 3059 ; 7 Yerg., 140. Nor is he bound under sec. 3060 of Code, which allows stay after two days, with assent of plaintiff, because it had been legally stayed before by W. G. Cox, and in that case this provision does not apply. *Howard v. Brownlow*, 4 Sneed, 550. That is all very clear, but another more serious question arises under sec. 3065 of the Code, from the act of 1846.

By that section the plaintiff may at any time before the expiration of the stay, if he deems his debt in danger, on account of the condition of the stayor, require the defendant "to justify or give other security," and in case of failure, to have execution "forthwith." This requires an affidavit of plaintiff, and two days' notice to defendant. The proof is, by the magistrate, that the plaintiff become dissatisfied with the Coxes, as security for stay of execution, and that, upon his application he issued the proper notice for Carson to give other security, or justify. The constable proves the service of this notice upon Carson, and both prove that Rawley then

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came forward and entered his name, and that was satisfactory to the plaintiff, and the time of stay run out, before this execution was issued. The magistrate further states that "he does not recollect whether said Gaw made affidavit preparatory to getting out and serving said notice or not." No affidavit is produced or otherwise proved, and the question is whether that can be dispensed with. The object of that requirement, is, that plaintiff shall not causelessly or whimsically put the defendant, who has already complied with the requirements of the law, to the trouble of hunting up other securities, or showing that those already given are sufficient. He shall not compel him do this, or lose the eight months delay to which the law entitles him, by making the debt secure, unless he will swear, and file his affidavit, that he believes his debt to be unsafe. This is entirely for the benefit of the original defendant. But if he be notified, and brings forward other stayors, without requiring the affidavit, does it lie in the mouth of the latter to object? What is it to him, whether the affidavit is made or waived? His willingness to become bound for the defendant cannot depend upon that, nor is his risk any the greater or less on that account.

If the plaintiff had issued his execution before the expiration of the stay, without complying with this law, it could have been superseded as illegal, by the defendant in the judgment and his original stayor. But that was not done. The original defendant, upon notice, came forward without requiring an affidavit, and did what the law required of him by giving the defendant Rawley as additional and satisfactory security. We think he is clearly bound.

Reverse the judgment below, and enter the proper judgment here.

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NATHAN COOK v. GEO. W. COOK *et al.*

1. *CHANCERY. Mortgage. Covenant.* A court of equity considers what ought to have been done, as done. Thus, if a covenant be entered into, agreeing to execute a mortgage to the covenantee upon the covenantor receiving the legal title to the land, the covenant not being registered, it will have the same effect as an unregistered mortgage.
2. *SAME. Prior equities. When party a purchaser for value. Deed of trust.* A conveyance of land in payment of an antecedent debt does not put the grantor in the position of a purchaser for value, nor entitle him to the protection of a court of equity, as against prior equities, either under the rules of the English chancery practice, or by the registry laws. Much less can it have this effect when the conveyance is intended as collateral security for pre-existing debts.

FROM WILSON.

Decree at the January Term, 1859. RIDLEY, Chancellor presiding.

W. L. MARTIN and E. I. GOLLADY, for the complainant.

JORDAN STOKES, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The decree of the Chancellor in this case is erroneous. We lay out of view altogether the allegations of fraud, contained in the answer of George W. Cook, because they are not supported by any proof whatever. We will first inquire as to the equities between complainant and the said George W.

The facts are, that William C. Dew had sold to the complainant a lot of ground near the town of Lebanon, and had given him a bond for the title, upon payment of the purchase money. This lot the complainant afterwards, and on the 8th of January, 1851, sold to the defendant, George W.

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Cook, who was to complete the payment to Dew, and take a deed from him, the complainant having assigned to Cook Dew's bond for title. In addition to the payment to be made Dew, Cook, as a further consideration for the lot, was to pay complainant a considerable sum of money, to secure which he executed to him various notes, one of which, for the sum of \$200.00, yet remains unpaid. This note bears date the 8th of January, 1851, is due the 1st of June, 1855, and carries interest from the 1st of January, 1852. George W. Cook executed to the complainant a writing, under seal, in which, after reciting the purchase of the lot, and describing it; and that it had been sold to him, with warranty against all claims, but the equity in favor of Dew, bound himself to give complainant, whenever the said Dew should make him a clear title to the same, a mortgage, or lien upon said lot, for such portion of the purchase money as should remain unpaid; or, in the event he might wish to transfer said lot, that then it should be bound for said unpaid money, unless the same be paid, or amply secured to the satisfaction of the complainant. This writing, in the transcript, is made to bear date the 9th of July, 1851; but this is, no doubt, a clerical error, as the attesting witness, Driffoos, with it before him, speaks of it as dated the 9th of January, 1851, and so are the pleadings. And though the sale was made on the 8th of January, and the note bears that date, and the defendant, in his answer, states this writing was not executed till a day or two after, yet we take it for granted it was, in truth, made contemporaneously with the sale; because it so states upon its face, and for other reasons apparent in the record. But we do not perceive how this becomes material in this case.

George W. Cook afterwards paid Dew the balance of the purchase money coming to him; and on the 19th of June, 1852, took his deed in fee to the lot, and the same was duly registered on the 23d of March, 1853; but he failed to execute to complainant any further mortgage, or lien, and the writing binding him to do so, was never registered.

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This bill was filed the 30th of May, 1855, to have satisfaction of the note, out of the lot. We think the complainant, as between him and George W. Cook, is entitled to the relief sought. It was his duty to have executed to complainant the mortgage so soon as he took the deed from Dew. A court of equity considers what ought to have been done, as done. The covenant must have the same effect as an unregistered mortgage. *Read v. Gaillard, Adm'r*, 2 Desaus. Rep., 552-6.

Do not the other defendants stand in the shoes of George W. Cook? We think they do; and that they cannot claim the attitude of *bona fide* innocent purchasers, without notice. As to them the facts are these: George W. Cook, on the 23d of March, 1853, executed a deed of trust conveying part of the lot to David Cook, Sr., in trust for the payment of sundry pre-existing debts, and it was proved and registered on the same day. It does not appear that the parties taking this deed, at the time of its execution, had actual notice of complainant's equity, and they deny that they had; but it does appear that the day after the deed was made they did have such notice, and, in effect, promised to pay complainant the note; and, afterwards, at the sale by the trustee, complainant was present and gave express notice of his claim to David Cook, jr., the purchaser, and others. He in fact forbid the sale, in consequence of which the lot only brought \$150.00. This sale was in 1853, and we take it David Cook, jr., the purchaser, in that year, paid the trustee, and that he paid the beneficiaries in the deed, which seems to have been made to secure debts for which the said David Cook, sr., and jr., were liable as the stayors of the said George W., he being the son of the former, and brother of the latter.

The other part of the lot appears to have been sold by George W. Cook to John R. Debow, and it was sold, by decree of the chancery court, as his property, in the spring of 1854, and purchased by the defendant, B. J. Tarver, at

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the price of \$855.00 ; for which he gave his notes in equal sums at one and two years ; one of which is paid, and the other not. When he made this payment, and whether before, or after the bill was filed, nowhere appears ; nor is there any allegation on the subject. Nor does it appear, nor is it averred, how the said Debow became the purchaser, whether by deed, or bond, or that he ever paid any thing. Nor does Tarver attempt to set up that Debow occupied the position of an innocent purchaser. As to the defendants, David Cook, sr., and jr., who took the deed of trust, and must be regarded as the purchasers of the part of the lot embraced in it, it has been repeatedly held that even the conveyance of land in payment of an antecedent debt, does not put the grantee in the position of a purchaser for value, nor entitle him to the protection of a court of equity, as against prior equities, either under the rules of the English chancery practice, or by the registry laws. Much less can it have this effect where the conveyance is in trust, as collateral security for pre-existing debts. Notes to *Bosset v. Nosworthy*, Leading Cases in Eq., 104 to 111 ; *Dickson v. Tillinghast*, 4 Paige, 215 ; *Brown v. Vanlier et al.*, 7 Hum., 239.

Then they are not protected by the deed of trust and could not be by any thing that happened afterwards, as they had full notice of complainant's equity. This is the case of a lien in the nature of a mortgage, and the remark of the court in *Green v. Demoss*, 10 Hum., 375, does not apply. We consider the mortgage as executed at the date of Dew's deed.

There is still less ground to protect Tarver as an innocent purchaser. He has not completed his purchase, or paid the purchase money. And we may remark that none of the answers contain such averments as are required for the protection of defendants, and in truth could not. 1 Meigs' Dig., 244-5.

If complainant be indebted to George W. Cook, as he alleges, it should be abated from the sum due complainant.

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The decree of the chancellor will be reversed, and a decree given for complainant; and a reference ordered to ascertain the sum due.

WETMORE v. BRIEN & BRADLEY.

1. **CONTRACT.** *Void if unlawful.* Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because the penalty implies a prohibition, though there are no prohibitory words in the statute.
2. **SAME.** *Same. Usury. Shaving.* When, therefore, a note is discounted at a greater rate of discount than is allowed by law, the taint of illegality affects the whole and every part of the transaction; not merely the contract for the excessive rate of discount, but the note itself, illegally discounted, although the note, taken by itself, may have been an independent contract, and free from any objection.
3. **SAME.** *Same. Same. Free Banks.* By law, persons exercising the privilege of Banking, under the act of 1851-2, are not authorised to discount or *shave* notes directly, or indirectly, at a greater discount than the other banks are allowed under existing laws; and a violation of this provision forfeits all rights of banking under this act; and the note thus discounted or shaved, is void, and payment thereof cannot be enforced.
4. **USURY.** *Discounting notes.* The regular business of discounting notes by deducting from their face the interest for the entire time they have to run, though in itself usurious—as the borrower pays interest on the amount thus deducted—has been long sanctioned by the courts, rather from necessity than upon principle.
5. **SAME.** *Shaving.* A note made in the course of a real business transaction, for which the original party has given a valuable consideration, is regarded as property; and, like other property, the owner may sell it for the most he can get, and whatever profit the purchaser may make on his purchase, there is nothing *usurious* in it.
6. **SAME.** *Same. Note made to raise money.* But if the note were made

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for the purpose of being sold to raise money ; or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail, and the purchaser, under such circumstances, with knowledge of the facts, either actual, or inferable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest.

FROM DAVIDSON.

REID, McEWEN, and DELANCEY, for the plaintiff.

A. EWING, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an action brought upon a paper of rather novel character ; but as no question is made upon the form or legal effect of the instrument, it may be treated, for the purposes of the present determination, as a promissory note, for \$2060.00, payable to Reese W. Porter, four months after date, at the Bank of Tennessee, at Nashville. The suit is against Brien, as one of the makers, and Bradley, as an endorser of said note.

This note, perhaps on the day it bears date, was discounted by the "Bank of Commerce," (one of the Banks organized under the act of 1851-2, ch. 113,) for the accommodation of the makers, at the rate of *fifteen* per cent. per annum.

The suit is prosecuted for the benefit of said Bank, as appears from the record.

The defence rests upon a provision of the act of 1855-6, ch. 250, sec. 11, passed to amend the "Free Banking law," of 1851-2. The provision, in substance, is : that persons exercising the privilege of banking under the act of 1851-2, "shall not be authorized to discount or *shave* notes, directly or indirectly, at a greater discount than the other banks are allowed, under existing laws ; and a violation of this section shall forfeit all rights of banking, under this act ;" and the

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persons so offending, are also "declared guilty of a misdemeanor, and, on conviction, shall be fined in a sum not less than fifty, nor more than five hundred dollars for each and every offence."

In the construction of this section of the act of 1855-6, the Circuit Judge held, that a violation of its provision amounted to an avoidance of the contract; to a forfeiture of the debt *in toto*; and, consequently, that no recovery could be had on a note thus illegally discounted.

For the plaintiff in error it is insisted, that this construction of the act is erroneous. The argument is, that the act does not, in terms, affect the contract, nor was it intended to avoid the contract, farther than to the extent of the usurious interest; that this act and the general usury laws of 1819, ch. 32, sec. 2, and 1835, ch. 50, sec. 4, are *pari materia*, and must be construed with reference to each other; that the act of 1855-6 intended nothing more than to affect its violation with two consequences—a forfeiture of the privilege, and a criminal prosecution—leaving the contract, except for the excess over the rate of interest allowed to other Banks, in force, as under the general usury laws.

Notwithstanding the plausibility of this construction of the law, we feel disposed, in view of the reasons of policy and expediency which led to its enactment, to yield to the construction given to it by the circuit court.

It turned out, as might have been expected, that the so-called banks, organized under the act of 1851-2, with but few exceptions, had departed from the legitimate business of banking; and had been converted into establishments for oppressing the community, by extorting usurious interest, under the pretext of discounting bills and notes, and in almost every other possible way. To check, if possible, these abuses, was the laudable object of the act under consideration. And it is perfectly obvious that this intention can be carried into effect upon no other construction of the law than that adopted by the Circuit Judge.

The argument against this construction, that the act does

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not, in terms, affect the contract, is of but little force. This was not necessary. It is well settled that a contract may be illegal, although not in contravention of the specific provisions of a statute, if it be opposed to the general policy and intent thereof. 6 Bing. N. C., 174. In the case of *Begnis v. Armistead*, 10 Bing., 110, the principle is distinctly stated, and is now well established, that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because the penalty implies a prohibition, though there are no prohibitory words in the statute." Smith's Leading Cases, vol. 1, 284, top.

From this principle it follows, that where a note is discounted at a greater rate of discount than is allowed by law, the taint of illegality affects the whole and every part of the transaction; not merely the contract for the excessive rate of discount, but the note itself, illegally discounted; although the note, taken by itself, may have been an independent contract, and free from any objection.

The true import of the prohibition is somewhat difficult to be understood. The regular business of discounting notes, by deducting from their face the interest for the entire time they have to run, though in itself usurious—as the borrower pays interest on the amount thus deducted—has been long sanctioned by the courts, rather from necessity than upon principle; and thus far the act is plain enough. But the prohibition upon the "Free Banks," not to "shave" notes at a greater rate of discount than the other banks are allowed under existing laws, is not quite so clear. The term "shave" has not, perhaps, heretofore been regarded as a technical term; but in our local jurisprudence, at least, it can no longer be regarded as untechnical, inasmuch as its use is sanctioned by the authors of the "Code of Tennessee."

The popular signification of the phrase "shaving notes," as contradistinguished from the legitimate business of discounting negotiable paper by the Banks, is well understood. The

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business of purchasing notes, in the market, at less than the amount called for on their face, or par value, is common amongst individuals in the community ; and by the act under consideration, the right to do so would seem to be impliedly conceded to corporations whose business it is to lend money, and exercise other functions of banking—under certain restrictions.

And this business of purchasing negotiable paper is, to a certain extent, sanctioned by law, although the purchaser may thereby get greatly more than legal interest for the use of his money. The distinction is between real transaction paper and paper made for the purpose of raising money by a sale in the market. See 7 Humph., 450 ; 4 Humph. 244. This distinction is important, between a loan, in the form of a sale, and an actual sale and purchase. The purchase must be actual, and made in good faith, and not merely colorable, to cover a usurious transaction. A note made in the course of a real business transaction, for which the original party has given a valuable consideration, is regarded as property ; and, like other property, the owner may sell it for the most he can get, and whatever profit the purchaser may make on his purchase, there is certainly nothing usurious in it. The owner may be induced, by doubts as to the solvency of the maker, or by the pressure of his necessities, to sell the note for less than its face, or less than its market value, and, in the absence of all fraud, this will not affect the validity of the transaction, or impart to it the character of usury. But if the note were made for the purpose of being sold, to raise money, or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail ; and the purchaser, under such circumstances, with knowledge of the facts, either actual, or inferable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest. In this sense, the word "shave" is to be understood in the act of 1855-6. And in this sense, and to this effect only, is the business of

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"shaving" notes, or other negotiable paper, either by individuals or banking corporations, tolerated by law. 2 Parsons on contracts, 421.

Judgment affirmed.

JEREMIAH STEPHENSON AND WIFE v. W. HARRISON, Ex'r, et al.

1. *WILL. Construction of. Slaves.* The deceased made his will in 1845, in which is the following clause: "I give and bequeath to my wife, Susannah Winston, all my property, both real and personal, during her life, including any money on hand, or notes or accounts due me, to dispose of as she may need for the use of the family, except my tract of land near Spring Hill, and my house and lot in Spring Hill, and my lots in Franklin." The land and lots excepted, are directed to be sold, and the proceeds when collected to be "deposited in the Planters' Bank at Franklin, and also the amount of money and debts due me, reserving to my wife, any of the last mentioned money that she may need for the use and benefit of my negroes, during her life, and at her death, it is my will, that all my slaves be set free." He requests the County Court to appoint some suitable person to make arrangements for the transportation of the slaves to Liberia, to be paid out of the proceeds of the land and lots. The remainder of that fund is to be applied as far as may be necessary, to pay the expenses of the slaves to Liberia; and what is left, to be equally divided among them. The codicil contains this clause: "I will and direct that all my money, which shall be deposited in the Bank by my executors, as in my will is directed, shall be applied, used and appropriated, by my executors, to the same object and to the same uses and purposes, as the money arising from my Spring Hill tract of land is willed and directed to be used in my will, of March 24th, 1845." Should the County Court fail to make the appointment requested, the executors are charged with the duty of carrying out his purpose, in regard to his slaves; and the testator further directs that "the money so deposited in the

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Bank from the sale of my land and lots, together with any remaining money of my estate that is not otherwise disposed of, after all expenses are paid, to be divided equally with my negroes that go to Liberia." Held:

1. That the wife has no right to any profits made upon the funds given to the slaves before their emancipation; but the same go to the slaves. The fund is not to be used, but if used and profits accrue, they belong to the slaves.
 2. That the codicil places the other funds directed to be deposited in Bank, precisely upon the same ground as that derived from the Spring Hill property, and are to enure to the benefit of the slaves at the death of their mistress, except so far as may be necessary for the support of the family, including the slaves, after applying the proceeds of their labor and the rents of lands.
2. **SLAVES. Right to sue.** Slaves may sue by next friend, in all cases where their right to freedom is involved, or where the right of property connected with the grant of freedom is involved, although the enjoyment of freedom is postponed to a future day.

FROM WILLIAMSON.

This cause was heard before Chancellor FRIERSON, at the October Term, 1859.

COOK and MEIGS, for the complainants.

MARSHALL, FOGG, CAMPBELL, McEWEN and FOSTER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This case comes up on the action of the Chancellor, upon demurrers to the original and cross bills, by which most of the important questions in the case were settled. This under the Code was a proper case to allow an appeal before final decree. The demurrers were to parts, and not the whole, of the bills, and answers were filed to the other parts.

It will be necessary to present some of the facts, in order to understand the questions which arise.

Samuel Winston died in Williamson county, in 1851, leav-

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ing a widow, who afterwards, married complainant, Stephenson, but no children. He owned valuable real estate, seventy slaves, and other personal property. He made his will in 1845, with a codicil in 1851, just before his death. The defendants, Harrison and Preyner, were appointed, and qualified executors.

He provided amply for his wife, and gave to all his slaves their freedom, at her death. In the will of 1845, he says : "I give and bequeath to my wife, Susannah Winston, all my property both real and personal, during her life, including any money on hand, or notes, or accounts due me, to dispose of as she may need for the use of the family, except my tract of land near Spring Hill, and my house and lot in Spring Hill, and my lots in Franklin."

The land and lots excepted, are directed to be sold on a credit, and the consideration, when collected, to be "deposited in the Planters' Bank at Franklin, and also the amount of money and debts due me, reserving to my wife any of the *last mentioned money*, that she may need for the use and benefit of my negroes, during her life, and at her death, it is my will that all my slaves be set free," and that the county court appoint some good disinterested man to make the necessary arrangements for taking them to Liberia, to be paid out of the money to be received for the sale of the lands and lots.

The balance of that fund to be used, as far as may be necessary, to pay their expenses to Liberia, and whatever may be left, to be divided equally among the slaves. He then makes some provision in relation to such as refuse to go, but this is revoked by the codicil, and all are required to go to Liberia. He also makes some changes as to the funds, as follows :

"I will and direct, that all my money which shall be deposited in the Bank by my executors, as in my will is directed, shall be applied, used and appropriated by my executors to the same object, and to the same uses and purposes as the money arising from my Spring Hill tract of land is willed and directed to be used in my will of March 24, 1845."

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It should have been noticed, that in the will of 1845, as a further provision for his wife, he gave her the tract of land on which he lived, \$1000 in cash, twenty shares of stock in the Columbia turnpike road, all his household and kitchen furniture, and all the rents and profits of his lands and negroes during her life, and then to dispose of as she saw fit. This of course does not apply to the slaves, or the land and lots directed to be sold, and specially applied, nor to the fund reserved for the slaves, but only to such property as is given to her absolutely. He also makes a further provision in relation to his slaves, to the effect, that if the county court refuse to appoint a man to carry out his purpose, his executors shall do so, and says: "the money so deposited in the bank, from the sale of my land and lots, together with any *remaining money of my estate that is not otherwise disposed of*, after all expenses are paid, to be divided equally with my negroes that go to Liberia."

It will be seen that the predominant idea and purpose in the mind of the testator, was the emancipation of his slaves, after they had served his wife during her life. So in relation to such of his money and property as he thought not required for her ample support and maintainance, with a reasonable portion to dispose of as she pleased, he desired his slaves to have its benefit when freed.

The original bill was filed February, 1858, and the amended or supplemental bill on the 7th of April following. By the last the slaves were made defendants. They answered, and then filed their cross bill by next friend, insisting upon the protection of their rights against the claims set up by the complainants, to the profits that may have been made by the executors, on the funds.

The object of these bills, is to have the will construed, and the rights of complainant, Susannah, declared in relation to the money directed to be deposited in Bank. It is stated that at the death of testator, there was about \$4,000 of cash on hand, then on deposit in the bank, and good notes to collect,

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of about \$12,000. It is further charged, that a large amount was realized by the executors for the property at Spring Hill and the sale of other property, and the executors, instead of continuing it in bank, as directed by the will, had used it in loaning at usury, and shaving notes, by which a large amount of profit had been realized by them. This is claimed by the complainants in the original bill, and also for the slaves in the cross bill.

The effect of the action of the court upon the demurrers, is, that according to the will, the slaves, when the time arrives for their emancipation, will be entitled to this fund; and that any profit made upon it, whether contrary to, or in accordance with their duty, by the executors, must be added to the fund for their benefit. Whether this is a correct construction of the will, is the only question now to be decided, except the preliminary one upon the cross bill of the slaves, as to their right until they are freed, or as to matters connected with and incidental to a suit for freedom, to occupy a standing in court.

As to this last point, we are referred to some cases in Wheeler on Slavery, and some positions and citations in Cobb's recent work on that subject, which would seem to go to the extent of the argument, that is, that slaves, while in that condition, cannot come into a court, except to assert the right to freedom, and the incidents thereto. If those authorities are to be so understood as to exclude them from the courts, in a case like that now before us, we cannot adopt them. Here is a *certain* right to liberty given, but the time of its enjoyment is postponed until the happening of a future *certain* event. Connected with this bequest of freedom, there are certain rights of property, or money given. How are these to be protected, but by the slaves, through a next friend? It is admitted that if the prospective right to freedom is endangered by sale, or an attempt to remove the slaves, or even by the loss of evidence, the threatened injury may be prevented by an appeal to the courts. Why does not the same principle extend to a case like this, where the fund provided for their enjoyment,

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when the day of freedom comes, is endangered by the claim of another? Suppose the case to be, that the beneficent provision made by the master, and placed under the control of trustees until the period for emancipation arrived, was about to be wasted and lost, by the fraud or mismanagement, or insolvency of the trustee, could not the beneficiaries appeal to the courts before the termination of their temporary and limited bondage? Surely there can be no principle that would prevent it. It would be entirely inconsistent with *our* liberal slave and emancipation Code, let *others* be as they may. The principle contended for in support of the demurrer on this point can only apply to suits against the master, or perhaps, others in relation to property disconnected with the claim of freedom. No other suit but for freedom, in which may be embraced claims to property, can be brought by slaves, while they are such, except where rights may be endangered, which are connected with a certain grant of freedom, to take effect in future. And this being that kind of case, the slaves have a standing in court.

The court in its action, upon the various demurrers, so construed the will as to deny the claim of Mrs. Stephenson to any right in profits made upon the fund arising from the Spring Hill property, and for that reason refused her an account. We think this was clearly right. It was not the intention of the testator that this fund should be used by any one, but to remain in bank, securing for the slaves, at the death of the widow. But if any profit was made upon it by the executors, it would constitute an addition to the fund for the same purpose. It was an accumulation that must go with the fund, whether made with or without authority. The trustees can have no benefit from it themselves, nor can it be separated from the fund for the benefit of any one else. So, the court was right in overruling the demurrer to the part of the bill of the slaves, which made a claim to these accumulations. We think the codicil places the other funds directed to be deposited in bank, precisely upon the same ground, as that derived from the Spring Hill property. That is, it is to enure

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to the benefit of the slaves at the death of their mistress, except so far as it may be necessary to the support of the family, including the slaves, after applying the proceeds of their labor, and the rents of lands. There can be no distinction in relation to these funds, upon a fair construction of the whole will. Whatever profit the executors may have made upon these funds must be accounted for, not for the benefit of the widow, but for that of the slaves. It will be regarded as an accretion of the fund, and go with it to the slaves upon their emancipation. The case will remain in court until that time arrives, for such orders as may be necessary, from time to time, for its protection. It will be for the court to determine whether it should remain inactive, or be made to accumulate in some safe mode under the direction and control of the Chancellor.

As to the boy, Bill, if it turns out upon investigation, that he was the property of the testator, as would seem to be the case according to the statements of the bill, his past hire, and future use will belong to the complainants in the original bill. They are also entitled to any rents that may have been received by the executors, and such as may accrue in future during the life of Mrs. Stephenson.

Such being the rights of the parties, the case will be remanded that they may be carried out and secured.

PERKINS AND WIFE v. CLACK *et al.*

WILL. Construction of. Creditors. The testator directed that his property be kept together by his executors, and managed by them until his youngest child should arrive at the age of twenty-one years. They were clothed with full power to sell any of the property and purchase other property; or exchange property, having the same power as the testator, to manage the estate for the benefit of his children.—

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He directed, when his youngest child arrived at the age of twenty one years, that the property be equally divided between his children, and the descendants of such as died. Held:

1. That the interests of the respective devisees and legatees were not to be severed from the mass of the estate, or to be enjoyed in possession until the youngest child arrived at the age of twenty-one years.

2. That the entire estate is placed in the exclusive possession, and under the control of the executors, with an unlimited power to manage it, until the youngest child shall attain his full age; and then it is to be equally divided between the surviving children, and the descendants of children who may have died, leaving children surviving them.

3. That, as neither of the children, have a right to demand that he shall be let into the possession of his share of the estate, until the youngest child arrives at age, a creditor of either child, seeking to subject his share to the satisfaction of his debt, can stand on no higher or different ground; and cannot obtain possession of a share sold until the happening of that event.

FROM GILES.

WALKER and BROWN, for the complainants.

JONES, for the defendants.

MCKINNEY, J., delivered the opinion of the Court.

The case of *Lockwood v. Nye*, 2 Swan's Rep., 515, establishes that, under a statutory law, a *remainder interest* of a debtor, in either real or personal estate, is subject to attachment, in equity for the satisfaction of his debts.

And on general principles, we suppose there can be no doubt as to the right of a creditor, whose legal remedy has been exhausted, to subject such estate in remainder to the discharge of his debt. If this be so, it would seem to follow, that any definite future interest in property, either real or personal, if vested, in *right*, though not, in *possession*, might be subjected, in equity, to the satisfaction of creditors.

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The correctness of this doctrine, in the abstract, is not so much controverted, as its application to this particular case. It is insisted that, under the provisions of the will of Spencer Clack, the interest of Thomas J. Clack, the debtor, cannot, *at present*, be made liable to the claims of the complainants.

This makes it necessary to state certain provisions of the will.

The testator, after making certain specific bequests in favor of his minor children, with the view of making them equal with such of his children as were married and settled in life, proceeds to dispose of the residue of his estate as follows :

“Item Third.—It is my will and desire, that all the balance of my property be kept together, by my executors ; and managed in the same manner, after my death, as before, until my youngest child shall arrive at the age of twenty-one years. And my executors are hereby clothed with full power to sell any of said property, real or personal, they may consider to the interest of the estate ; and in like manner, to purchase other property, real or personal ; or exchange property. It being my will and desire, that they have the same power, in all respects, to manage my estate for the benefit of my children, as I could do were I living.”

“Item Fifth.—It is my will and desire, that when my youngest child shall arrive at the age of twenty-one years, that my property, both real and personal, shall be equally divided between my children, and the decendants of my children :—if any of them shall be dead and leave any children surviving them, the children of such dead child taking the interest which his or her parent would have taken, if he or she had lived.”

Provision is made that his son John “shall have the control and management of the farm ;” and likewise, that a widowed daughter, during her widowhood, shall remain in his family, “and manage and control the domestic affairs,” with-

out any charge against her. His sons John and Calvin are nominated executors of the will.

It is agreed upon the record, that the youngest child is now between seventeen and eighteen years of age. It is further agreed, that the testator's two youngest daughters, who were minors, have died since the making of the will, which bears date the 1st of February, 1854, and the testator died on the 30th of September of that year.

It is somewhat difficult to define, with technical precision, the exact nature of the interest of the executors under the third clause of the will, and of the devisees and legatees under the fifth clause. But one thing is very clear,—the interests of the respective devisees and legatees were not to be severed from the mass of the estate ; or to be enjoyed in possession, until the happening of a particular future event, namely, the coming of age of the youngest child ; and that event is yet distant some three or four years.

The entire estate is placed in the exclusive possession and under the control of the executors, with an unlimited power to manage it, and to convert, or exchange it, as in their judgment, may be most for the interest of all the children, until the youngest child shall attain his full age ; and *then* it is equally to be divided between the surviving children, and the decedents of children who may have died, leaving children surviving them.

If the third clause be construed as carving out of the estate a particular interest of a chattel nature, to be vested in the executors for a limited time, that is, till the youngest son arrives at full age ; and the interest of the children, under the fifth clause, be considered as in the nature of a remainder—and we are at a loss how otherwise to regard these respective interests—then it will follow, inevitably, on principle, that the interests of the children, under the fifth clause, are vested interests, and not contingent, as argued for the defendants.

The remainder and the particular estate, are but different portions of the same entire estate. And both vest concur-

rently, in point of right, though the remainder does not take effect, in possession, until the termination of the particular estate.

Supposing this to be the proper construction of the will, another question arises, upon which the determination of the case, in part, depends, and that is, when does the remainder interest, under the circumstances of this particular case, fall into possession?

Has either of the children of the testator a right, under the provisions of the will, to demand that he shall be let into the possession of his share of the estate, until the happening of the event contemplated by the testator—the coming of age of his youngest child? If not, it is clear that a creditor seeking to subject such share to the satisfaction of his debt, can stand on no higher or different ground.

The decree assumes that the object of the testator, or at least the primary object, in postponing the division of the estate until the youngest child (which was a son) should attain his majority, was with a view to the nurture, education, and care of his two infant daughters; and that, inasmuch as they are both dead, the reason of that provision has ceased, and consequently there no longer exists any sufficient cause for delaying the final division of the estate.

And in this view the chancellor decreed an immediate division, and ordered an account.

We think the decree, in this respect, is erroneous. It is based upon a matter of pure speculation; and is in violation of the plain letter of the will. Thus far the will is set aside, and a new and different will is made for the testator. We cannot know what motives induced him to make this particular provision; nor is the inquiry relevant. It is enough that he thought proper thus to ordain; and his will, clearly expressed, stands as the law by which the courts must be governed in expounding the instrument.

If the youngest son had died before reaching the age of twenty-one years, it might, with some plausibility, be insisted

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that, on his death, the division should take place. But, if we are correct in assuming that, by implication, a particular interest or estate was vested in the executors, to continue until the youngest son should attain his full age, it would, perhaps, be difficult to maintain that such interest or estate could terminate, or be cut off before the period when the infant, had he lived, would have arrived at the age of twenty-one years.

The education and maintenance of the youngest son, is made a charge upon the income of the entire estate, for which he is not to account. The support of the widowed daughter, is likewise a charge upon the income, for which she is not to account. The son, charged with the management of the farm, till the time fixed for division, also has an interest in the matter, as he is to be compensated for his services, and the compensation is, of course, to be paid out of the income. The decree is in conflict with these rights.

The will, in its whole scheme, and in all its arrangements and dispositions, looks to the full age of the youngest child, as the period for division. If we might conjecture that the interests of the minor children formed the inducement to the postponement of the division, then there is nothing, either in the context of the will, or extrinsic of it—so far as we can see from this record—to show that the interests of the infant son were of less consideration, in the testator's view, than the interests of his infant daughters; and it cannot be presumed that such was the case. We have at most, then, upon the hypothesis assumed, the case of only a partial failure of the object or purpose of this provision of the will; and clearly this would not be a sufficient ground for rejecting the provision—all other considerations aside. But we rest the determination of this point upon the ground that the time of division, in view of the manifest intention of the testator, is matter of substance. Upon the construction of the will, the meaning is apparent, that the time of division is the time when the devises and legacies should vest in possession; and

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the time, so far as respects the right of enjoyment, is annexed to the division or distribution of the estate, and not simply to the devises and legacies.

The cause will be remanded, to abide the period for division, fixed by the will, unless the parties shall mutually agree to an earlier division.

The decree will be modified accordingly.

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1. *Special Administrator.* If a party die intestate, pending a suit, the County Court has no power to appoint a special administrator for the purpose of prosecuting or defending that particular suit. *Bandy v. Walker*, 568.
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2. *Suit on judgment in favor of an administrator, rendered in another State. Debet and detinet.* A suit may be maintained in the *debet and detinet*, on a judgment rendered in a sister State, in the name of an administrator appointed in such State without taking out letters of administration in this State. *Page v. Cravens*, 883.
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5. *Same. When new sureties are indemnified.* If the remaining executor resign, and one of his sureties is appointed administrator *de bonis non*, with the will annexed, and sufficient indemnity is given him to cover such *devastavit*; or, if such indemnity is given to the new sureties, the primary liability rests upon them, and not upon the co-executors. *Ibid.*

6. *Same. Same. When indemnity not sufficient to save both.* If the indemnity given by the remaining executor was to secure and make good the estate then in his hands, or which he had wasted, and were insufficient to save harmless, both the co-executors and new sureties, the latter are, primarily, liable. *Ibid.*
7. *Slaves pass to distributees.* The title to slaves of an intestate passes directly to the distributees, subject to the trust in the personal representative, in behalf of the estate and of creditors; and as between themselves, and as against all others except creditors of the estate, the title of the distributees is complete without the assent of the administrator. *Elliott and Wife v. Holder et al.*, 698.
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ADMINISTRATORS AND EXECUTORS.

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2. *Cannot be granted by a Justice of the Peace after two days.* Code, § 3140. By § 3140 of the Code, two entire days (exclusive of Sunday,) after judgment, are allowed for an appeal from a Justice's judgment. After the expiration of the two days, the Justice has no jurisdiction to grant an appeal, and the same should be dismissed. *Gilbert v. Driver*, 468.
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BILLS AND NOTES.

1. *Demand and notice. What sufficient demand. Banking hours.* The presentment of a bill or note for payment, must be made within reasonable hours during the day; and should be made during the usual hours of business. Business hours, however, except in the case of banks, include the whole day, unless there be some known custom or usage of trade to the contrary. And as the general usage of banks is to limit their business transactions to certain hours, a presentment, or demand, out of banking hours, is not sufficient. *Swan v. Hodges*, 251.
2. *Same. Waiver of demand and notice.* If the indorser, before or at the maturity of the note, has protected himself from loss by taking adequate collateral security, or, by accepting an assignment of *all* the maker's property—though it be inadequate to meet the liability upon the indorsement—it is a *waiver* of the legal right of the indorser to require proof of demand and notice. *Ibid.*
3. *Same. Same.* But the taking of a security or indemnity by an indorser, after the note *has become due*, under a mistaken impression or belief that he is legally bound to pay the note, will not bind him if there has not been a due presentment, and notice of the dishonor. *Ibid.*
4. *Note executed to partners or joint payees, vests in the survivor. Parties. Partnership.* If a note is executed to two as partners or joint payees, upon the death of one, the legal title and right of suit in the note, would vest in the survivor; and his personal representatives could maintain an action upon it. *Walker v. Galbreath & Gambrel, Adm'rs.*, 815.
5. *Notice of dishonor. Endorser.* No particular form of notice to an endorser is required by law. The notice, if it is sufficient to put the endorser upon inquiry and to prepare to pay the note, and the jury is satisfied it refers to the note in suit, and no other note is shown to

have been endorsed, to which it could refer, will bind the endorser. *Myers et al. v. The Bank of Tennessee*, 830.

6. *Same. Same. The question as to notice must be left to the jury.* The question as to the identity of the note mentioned in the notice, with the note sued on; and, also, the question whether, notwithstanding the mistake, the endorser had substantial notice as to what note it was intended to fix his liability upon, by the notarial protest, are to be left to the jury. *Ibid.*
7. *Endorsement of. Parties to suit on.* The endorser of a note may sue the maker in his own name, or in the name of the payee, for his use and benefit. *Burk v. Bonner*, 686.

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BOND.

1. *Acceptance of. Presumption.* A bond containing stipulations beneficial to the obligee, though delivered to a stranger to his use, is, until he reject the same, presumed to be accepted by him; but the presumption is otherwise, if the stipulations may work an injury to him. *Ezell v. The Justices of Giles County*, 588.
2. *Statute of limitations. Contract. Breach, rescission, or abandonment of.* If no cause of action, either for a breach of a contract, or for the money paid under it, upon its rescission or abandonment, exist until within three years before the bringing of suit, the statute of limitations will not bar a recovery. *Ibid.*

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1. *Constable. Attachment. Effect of service of a writ of supersedeas on an officer. Forma pauperis.* The issuance and service of a writ of supersedeas upon an officer having property in his hands under an attachment or *fi. fa.*, has the effect to release the property, and authorize the officer to return it to the debtor without bond for its forthcoming at the end of the suit. And this is so, although the writ is sued out in *forma pauperis*. *McCamy v. Lawson et al.*, 256.

2. *Office of the writs. Confined to the grounds stated in the petition. Stayor.* In applications for writs of certiorari and supersedeas by a stayor, to bring up and quash an execution against him, the grounds presented and relied on in the petition, unless for sufficient cause the same is amended, and no others, are open for investigation. *Hollins & Co. v. Johnson*, 846.

CHAMPERTY.

1. *Adverse possession. Title.* A sale by one out of possession, of land adversely held, is void, whether the vendor's title be valid or invalid; nor does it require any length of adverse possession to make a sale and conveyance of land so possessed by another champertous and void. The fact that it is adversely held is sufficient. *Kincaid v. Meadows et al.*, 188.
2. *Rents or profits for a year. Act of 1821. Question reserved.* What is the meaning of the words, "or taken the rents or profits for one whole year next before the sale," used in the act of 1821? *Ibid.*
3. *Evidence. When attorney implicated, a competent witness.* If, by the admissions of a party, a champertous contract is established between him and his attorney, such attorney is not a competent witness to prove that the statements of his client are false, and that no such contract was entered into. *Dowell et al. v. Dowell et al.*, 502.

CHANCERY.

1. *Mortgage. Covenant.* A court of equity considers what ought to have been done, as done. Thus, if a covenant be entered into, agreeing to execute a mortgage to the covenantee upon the covenantor receiving the legal title to the land, the covenant not being registered, it will have the same effect as an unregistered mortgage. *Cook v. Cook et al.*, 719.
2. *Prior equities. When party a purchaser for value. Deed of Trust.* A conveyance of land in payment of an antecedent debt does not put the grantor in the position of a purchaser for value, nor entitle him to the protection of a court of equity, as against prior equities, either under the rules of the English chancery practice, or by the registry laws. Much less can it have this effect when the conveyance is intended as collateral security for pre-existing debts. *Ibid.*

See EVIDENCE. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES. JURISDICTION. PARTNERSHIP. REDEMPTION.

CHANCERY JURISDICTION.

1. *Mortgage. When title re-vests.* Upon the execution of a mortgage, the legal title to the property conveyed passes out of the mortgagor

and vests in the trustee or mortgagee ; but upon payment, by the mortgagor, of the debts secured by the mortgage, the legal title to the property re-vests in him and the mortgage cannot be set up against him in a court of law or equity. *Carter v. Taylor et al.*, 80.

2. *Same. Payment of debts by a third person.* If the mortgage debts are paid by a stranger to the instrument, he would be regarded as an assignee of the mortgage and might use it for his protection. This would not extinguish the legal title of the trustee ; and if the party thus paying the debts secured has taken possession of the land conveyed, a Court of Chancery would entertain jurisdiction to adjust the equities and rights of the parties ; restore the mortgagor to the possession of his land ; refund to the party having paid the mortgage debts the amount paid, with interest, charging him with rents ; and divest the title out of the trustee, and vest it in the mortgagor. *Ibid.*
3. *To remove cloud from title.* If a cloud rests upon the title of a party to real estate, by reason of an unsatisfied mortgage, or a deed made without authority, such person has the right to come into a Court of Equity to have said cloud removed and his title quieted and perfected. *Ibid.*
4. *Partition when ordered.* A Court of Equity will not entertain a bill for partition until the legal title is settled ; but if the titles are equitable, or there are equities to settle, a Court of Equity may be resorted to for this purpose : And having taken jurisdiction, a partition will be decreed, if a proper case is made out for partition. *Ibid.*
5. *Rule as to relief.* If a Court of Chancery has obtained jurisdiction of a cause for any purpose, it will retain it until the whole matter is disposed of, and the rights of the parties settled. *Almony and Wife v. Hicks et al.*, 89.
6. *Cloud upon title. Void deed.* A Court of Chancery has jurisdiction to remove a cloud from the title of a party claiming real estate, by cancelling a void, or voidable deed. This jurisdiction will be exercised whether the character of the deed, or other instrument complained of, appears upon its face, or otherwise ; and, although the defendants are in possession, and complainants have the legal title, and might sue at law for the recovery of the land, that not being esteemed adequate relief. *Ibid.*
7. *Same. Pleading.* A bill to remove a cloud from the title to real estate need not ask any discovery, or state any defect of proof, or the witnesses whose proof is relied upon for the relief. A simple statement, that the instrument is void, or voidable, with the proper prayer, is sufficient. *Ibid.*
8. *Partition. Demurrer.* A Court of Chancery has no jurisdiction

to decree a partition of lands while the title is in dispute, and if this fact appears upon the face of the bill it will be dismissed upon demurrer. But if the bill alleges other grounds of equitable relief, or an amended bill is filed abandoning the question of partition, and making out a proper case for relief, a general demurrer will not be sustained. *Ibid.*

9. *Interference with compromises made in the legal forum.* Investigation into the terms of adjustment of suits in the legal forum, where there is a disagreement as to them, are to be discouraged by a Court of Equity—being from their nature incapable of a satisfactory determination, and do not tend to enhance the moral influence of the administration of justice, or to elevate the profession, in the eyes of the community. *Humphreys v. McClaud*, 235.
10. *Securities, contribution by.* If two or more sureties are bound for the same principal, and upon his default one of them is compelled to pay the money, or perform any other obligation, for which they all become bound, the security who has paid the whole can, in a Court of Equity, compel contribution from all the others, for what he has done in relieving them from a common burthen. *Crowder v. Denny*, 359.
11. *Same. Remedy at law.* The jurisdiction conferred upon Courts of Law upon this subject, as well by the ordinary action as by motion, does not affect that originally and intrinsically belonging to equity. *Ibid.*
12. *Demurrer.* If there is no demurrer to a bill, the Chancellor, under the statute, has jurisdiction to hear and determine the cause upon the same principles that would govern a court of law. *Johnson & Draper v. Price*, 549.
13. *Will. Legatees. Division.* If the proceeds of notes are bequeathed, and the legatees agree to divide the notes before collected, a portion of which prove to be insolvent, the other legatees will be required to refund to the legatee receiving the insolvent notes, their ratable part of the same. *Brents & Wife v. Brown et al*, 560.
14. *Mistake Fraud.* If, at the time said notes are divided, the parties are of opinion they are all good, and it turns out to be otherwise, the loss is the result of a mistake, from which the other legatees derived a benefit, and a Court of Equity will grant relief, although no fraud intervened. *Ibid.*
15. *Different equities.* When there are several equities and rights between the parties to a suit in chancery, the Court has the power and will adjust these various equities and rights by a proper decree in the cause. *Keeling v. Heard & Hickerson*, 592.

See CONFLICT OF LAWS. GUARDIAN AND WARD. HUSBAND AND WIFE. QUIA TIMET.

CHANCERY PLEADING.

1. *Demurrer. Statute of Limitations.* If, by the lapse of time, no right of action exists in the complainant, from his own showing, this may be taken advantage of upon demurrer. And this rule applies, *a fortiori*, where, by force of the statute, the title as well as the remedy of complainant are both destroyed. *McClung et al. v. Sneed et al.*, 218.
2. *Same. Same. Disability* If it appears, upon the face of the bill, that the land sought to be recovered has been adversely held for more than seven years, under an assurance purporting to convey an estate *in fee, prima facie*, this possession confers on the possessor a good title, by force of the statute of limitations; and if the complainant means to avoid this apparent bar, by any of the disabilities contained in the *proviso* of the statute, it is incumbent on him to allege, in the bill, its existence at the time the cause of action accrued, with such other averments of its continued existence as will show that complainant's right has been defeated by the statute. *Ibid.*
3. *Parties. Feme covert.* It is not essential to the validity either of a bill or petition that the complainants should sign them. It is sufficient if their names appear in the body or caption of them. If the name of a *feme covert* is used with that of her husband as a complainant, she is a party to the suit. *Swan v. Newman et al.*, 288.

CHANCERY PRACTICE.

1. *Bill dismissed upon motion to dissolve the injunction.* If the complainant shows upon the face of his bill, that he would be entitled to no relief if the allegations were sustained by proof, it is not error to dismiss the bill upon a motion to dissolve the injunction. *Mayse v. Biggs and Wife*, 86.
2. *Same. Remanding cause.* If a cause is prematurely heard and the bill dismissed, it will not be remanded for that reason, if it could have no other effect than to produce delay, and increase costs. *Ibid.*
4. *When the answer simply makes up an issue.* If an answer in Chancery is founded merely on information, it has no other effect than to make up an issue between the parties; and, in such case, the weight of evidence controls the determination of the issue. *Wilkins v. May et al.*, 178.
5. *Bill dismissed upon motion, or by the Chancellor.* A bill totally wanting in equity upon its face, or which shows that the complainant is entitled to no relief, may be dismissed upon the motion of the defendant, or by

the Chancellor of his own accord. Such a bill requires no answer, and its dismissal can do no injury to the complainant. *Earles et al. v Earles et al.*, 866.

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See EVIDENCE.

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2. *Questions of science. Instructions asked.* There is no rule of law by which the Judge in his instructions to the jury would be required to settle questions of science, so as to put him in error for failing to do so. But if such a rule did exist, a party could not have the advantage of the objection unless he had requested a charge on that point. *Sewanee Mining Co. v. Best & Bro.*, 701.

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COMMISSIONER.

1. *Clerk. Act of 1849, ch. 51, § 2.* By the Act of 1849, ch. 51, *sec.* 2, the appointment of Special Commissioner is distinct from the office of Clerk. The appointment is not under the Constitution, but under the authority conferred by the statute. The two offices are, in legal contemplation, distinct, though filled by the same person. The Special Commissioner is properly a *trustee*; and the condition of the bond obliges him to perform all the duties of the trust. *Williams et. al. v. Bowman, Ex'r, &c.*, 671.
2. *Duration of the appointment. Sureties.* The duration of the appointment is not limited by law. This is left to the discretion of the court, according to the exigencies of the various cases that may arise. And if the duration of the appointment be not limited, as to time, by the court, in the order of appointment, it follows that the appointment continues until the duties of the trust are discharged. *Ibid.*
3. *Same. Same.* By the express terms of the bond, the Special Commissioner is bound faithfully to account for and pay over all such sums of money as may come into his hands; and if his term of office of Clerk expires before he has wound up his trust as Special Commissioner, and he retain and collect notes as such Commissioner, and fail to account for and pay over the same, he and his securities are liable therefor. *Ibid.*
4. *Same. Handing over notes. Question reserved.* If the office of Special Commissioner and Clerk are united in the same person, is it his duty, on retiring from the office of Clerk to hand over notes taken as Special Commissioner, to his successor; and, if so handed over, will it discharge him and his securities from liability? *Ibid.*

See COUNTY COURT.

COMMON CARRIER.

1. *Liability for slaves. Rule modified.* Slaves have volition and possess reason and feeling. They cannot be stored away like a bale of goods, or other merchandise. The great rigor of the law, therefore, as to the liability of common carriers of goods, or other property, does not apply to slaves. Where a slave is placed with a common carrier, to be transported from one point to another, for hire or reward, the carrier would be bound to use ordinary diligence only, in taking care of him, and securing him against injuries, or escape. *Scruggs v. Davis*, 664.
2. *Same. Question reserved.* If the master goes on board a boat or other conveyance, and takes his slave with him, having charge and control of the slave, and without an express undertaking by the carrier, to watch and guard his movements, would any duty devolve on him in reference to the slave? *Ibid.*

COMMUTATION OF PUNISHMENT.

See CRIMINAL LAW.

COMPROMISES.

See CHANCERY JURISDICTION.

CONFLICT OF LAWS.

1. *Effect to be given to the laws of another State.* Effect will be given to the laws of another State whenever the rights of a litigant before our tribunals are derived from, or are dependent on those laws; and when such recognition is not prejudicial to our interests or the rights of our citizens. *Talmadge et al. v. The North American Coal & Transportation Company*, 387.
2. *Chancery. Jurisdiction. Specific performance.* A court of equity, acting *in personam*, may entertain a bill for the specific performance of a contract respecting land situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court. *Johnson v. Kimbro et al.*, 557.

See PARTITION.

CONSIDERATION.

See FRAUDULENT CONVEYANCES. INNOCENT PURCHASER. MORTGAGE. TRUST AND TRUSTEE.

CONSTABLE.

See CERTIORARI AND SUPERSEDEAS. CONSTITUTIONAL LAW. PAYMENT.

CONSTITUTIONAL LAW.

1. *Sheriff. Constable. Official term of.* The constitution simply prescribes the mode of appointment, and the duration of the term of office of sheriffs and constables. The time and manner of qualification are left to be regulated by the Legislature. *Nolin v. Parchmen et al.*, 609.
2. *Same. Same. Same. Act of 1835, ch. 1, sec. 12.* By the act of 1835, ch. 1, sec. 12, the officer holding the election for constables is required to certify the result of the election to the County Court; and, thereupon, said Court shall take bond and security from the party elected and qualify him as now prescribed by law: *after which said party shall enter upon the duties of the office of constable.* His official term of "two years," therefore, commences from the date of his qualification; and not from the day of his election to the office. *Ibid.*
3. *Officer de facto. Pro tem appointment of Judge.* The constitution requires a Circuit Judge to be *thirty years* of age. But, if the appointing power confers the office upon one who is not competent by that test, he may be removed from the office and his powers terminated by a proper proceeding; but, until that is done, his acts are binding. *Blackburn v. The State*, 690.
4. *Same. Same.* In such a case the appointee is an officer *de facto*, and his official acts are binding and valid. The competency of such officer, acting under a commission, cannot be enquired into by the parties affected by his acts. *Ibid.*

See CONTRACT. CORPORATIONS. CRIMINAL LAW. TAXATION.

CONSTRUCTION OF WRITINGS.

Deed reserving an occupancy during life. If a deed is executed reserving an occupancy during life to the donor or bargainor, the entire estate passes, as between the parties to the deed. No right would remain in the donor or bargainor except, merely the right to possess, and, perhaps, to enjoy the profits during life. *Daugherty & Wife v. Marcum et al.*, 828.

See CONTRACT. CORPORATIONS. FORCIBLE ENTRY AND DETAINER.
FREEDOM. RAILROAD COMPANIES. SALE OF REAL ESTATE.
SCIRE FACIAS. STAY OF EXECUTION. WILLS.

CONTRACT.

1. *Obligation to deliver specific articles. When place of delivery fixed* If, in an obligation for the delivery of specific articles, the time and place of delivery are fixed in the face of the instrument the property must be delivered at the place designated. A delivery at a place near the one specified, is not sufficient. *Butler v. Ouson*, 65.

2. *Same. Same. Evidence not admissible to change the place of delivery.* Parol evidence is inadmissible to show that it was the understanding of the parties that the property should be delivered at a place different from the one designated in the obligation. *Ibid.*
3. *Title retained. Possession delivered.* A contract for the sale of personal property, by which the possession is delivered to the purchaser, but the title retained in the seller until the purchase money is paid, is valid, and will be enforced. And if the purchaser dispose of the property, by sale, before the title is vested in him by payment of the purchase money, the original owner may follow it in the hands of such third person. *Price v. Jones, 84.*
4. *Same. Same. The injured party may sue.* If a purchaser who has thus failed to perfect his title, by payment of the purchase money, sells the property to a third person, such third person may, upon application of the original owner, deliver up the property, and sue his vendor and recover damages for the injury done him. *Ibid.*
5. *Same. Innocent purchaser. Caveat emptor.* The payment of the purchase money by the second purchaser, does not place him in the attitude of an innocent purchaser without notice. It is a question of right, and not one of notice. The maxim, *caveat emptor* applies: and if the person from whom the purchase is made has no title, his vendee can acquire none. The fact that the first purchaser was in possession of the property does not change the principle. *Ibid.*
6. *Same. Evidence. Admissions of a party to the contract.* The declarations of the parties to a contract, made at a time when they are the only parties in interest, are competent evidence. And such evidence is admissible on trials between third persons when the terms of such contract become material. *Ibid.*
7. *Imbecility. Fraud.* Although a contract made by a person of sound mind and fair understanding will not be set aside merely because it is a rash, improvident, or hard bargain; yet, if such contract be made with a person of weak understanding, arising from the infirmity of age, or other cause, a natural inference arises that it was obtained by fraud, circumvention, or undue influence; and a degree of weakness of intellect, far below that which would justify a commission of lunacy, coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside an important deed made by such person. *Walker et al. v. McCoy and Wife, 108.*
8. *Construction. Note to be paid in a particular manner.* If a note be executed for money, with the privilege to the defendant to discharge it in a different manner—the place, but no day being fixed for the performance of the condition—it is a good defence thereto to show a readiness and ability, at the place fixed, whenever called on, to discharge the same in the manner stipulated. *Smith v. Smith, 116.*

9. *Partnership. Implied promise.* If one member of a firm receives stolen property, knowing it to have been stolen, and, in order to prevent a prosecution for the felony, pays the value of the stolen goods out of the means of the firm, without the knowledge or consent of his co-partner, the innocent partner cannot maintain an action in the name of the firm, against the person receiving the money, to recover the same back. He is affected by the act of his co-plaintiff in the suit. Nor would the law imply a promise under such circumstances to refund the money. *Johnson v. Byerly & Owens*, 194.

10. *Construction. Sale of land. Rents. Interest. Consideration.* Price sold Thomas the one-half of a tract of land for three thousand dollars. After the description of the land, the article of agreement continues thus: "Furthermore, I, J. W. Price, propose to give my daughter, Julia A. said Thoma's wife, the other half of said land; which, if I fail to do, I hereby bind myself and my heirs to refund the money to said Thomas which he may pay for said land, together with its interest." Price bound himself to deliver the possession to Thomas, and, until he done so, to allow him the rent of half the whole tract, together with interest on all the money he might pay toward the land. Held:

1. The stipulation in favor of the wife of Thomas was no part of the consideration for the \$3,000, agreed to be paid upon the contingency stated. The moiety purchased by Thomas was the sole consideration.

2. The stipulation to give the other half of the tract of land to Mrs. Thomas, and, in case of failure, to refund to her husband three thousand dollars, was a naked, voluntary undertaking—a *nudum pactum*—and cannot be enforced in favor of Thomas.

3. If binding, Price would have the right to carry out the agreement at any time during his life, no time being fixed for its performance; or it might be done in his will.

4. Although it would seem inequitable that Thomas should get the rents until placed in possession, and at the same time interest on what he had paid—such is the agreement of the parties, and will be enforced. *Price v. Thomas*, 288.

11. *Illegal. Fraudulent.* The fraud may be shown by the defendant. It is well settled that an action will not lie to enforce a contract made in violation of a statute, or of the common law, or which is criminal in its character, or against public policy. The defendant, not because of any favor to him, but because he is such, can allege and show the invalidity of the contract, and thereby defeat the action. *Parks v. McKamy*, 297.

12. *Inviolability of. Constitutional law. State.* The provision of the Constitution securing the inviolability of contracts, extends as much to

contracts with a State as to contracts between individuals. *McCallie v. The Mayor and Aldermen of Chattanooga*, 317.

13. *When implied.* Agent William Strickland was employed as Architect of the State Capitol and employed his son, Francis, as assistant Architect. He was not authorized by the Commissioners to employ an assistant; and, as no contract was entered into between the Commissioners and Francis Strickland, or by William Strickland and him, by their authority; and as under the facts proven, none can be implied by law, the said Francis is not entitled to recover compensation from the State. *State v. Strickland*, 644.

14. *Void if unlawful.* Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because the penalty implies a prohibition, though there are no prohibitory words in the statute. *Wetmore v. Brien & Bradley*, 723.

15. *Same. Usury. Shaving.* When, therefore, a note is discounted at a greater rate of discount than is allowed by law, the taint of illegality affects the whole and every part of the transaction; not merely the contract for the excessive rate of discount, but the note itself, illegally discounted, although the note, taken by itself, may have been an independent contract, and free from any objection. *Ibid.*

16. *Same. Same. Free Banks.* By law, persons exercising the privilege of Banking, under the act of 1851-2, are not authorized to discount or shave notes directly, or indirectly, at a greater discount than the other banks are allowed under existing laws; and a violation of this provision forfeits all rights of banking under this act; and the note thus discounted or shaved, is void, and payment thereof cannot be enforced. *Ibid.*

See BONDS. CORPORATIONS. FREEDOM. REGISTRATION. SALE OF REAL ESTATE. SPECIFIC PERFORMANCE. STAY OF EXECUTION.

CONTRIBUTION.

1. *Among wrong-doers.* The equity of contribution arises where several persons are bound by a common charge, not arising *ex delicto*, and their order of liability has been accidentally deranged. If the liability be joint, he who has paid more than his share, is entitled to contribution from the rest. But this equity can never exist if the charge is not binding, or the liability arise *ex delicto*, for there can be no contribution among wrong-doers. *Rhea v. White et al.*, 121.

2. *Same. When distributees can have contribution. Slaves.* If an ancestor purchase slaves in which his vendor had, only, a life estate, and

upon his death, his distributees make a division of said slaves, they, *eo instanti*, become wrong-doers, and may be sued by the true owner. And the distributee who draws said slaves, being *in pari delicto*, cannot, if sued, and the slaves recovered, have contribution from the other distributees, unless he aver and prove that said division was made by mistake, and in ignorance of the want of title in the ancestor. *Ibid.*

3. *In damages for a tort.* In a recovery against several defendants of damages for a *tort*, no right of contribution exists in favor of either, whatever may have been the nature of the case, or the apparent right of the one on principles of natural justice to have such contribution, or to throw the entire satisfaction of the judgment on the other party. *Anderson v. Saylor*, 551.

See CHANCERY JURISDICTION.

CONVERSION.

1. *Trover. Guardian.* A guardian has only a naked authority, not coupled with an interest, and cannot consent to the conversion of his ward's property, and thereby defeat a recovery in an action of *trover* brought by him for the value of the property. *Huggins & Ransom v. Moore et al.*, 426.
2. *Same. Same. Case in judgment.* A guardian hired out the slave of his ward to work at a mill, with a stipulation that he was not to work as fireman. The hirer worked the slave as fireman, and, also, sub-hired him. The ward sued for a conversion of the slave. Held, that the consent of the guardian, after the hiring, to the conversion of the slave, would not bar a recovery. *Ibid.*

See FACTOR AND PRINCIPAL. SALE OF REAL ESTATE.

CORPORATIONS.

1. *Powers. Constitutional law.* A corporation can pass no by-law inconsistent with the constitution and laws of the State. Its by-laws must, also, be reasonable, and not oppressive. Subject to these restrictions, the power to make by-laws and enforce them by penalties, exist in all municipal corporations. *Smith & Lackey v. The Mayor and Aldermen of Knoxville*, 245.
2. *Same. Case in judgment.* The Mayor and Aldermen of the city of Knoxville passed an ordinance requiring all houses kept for the retailing of spirituous liquors, to be closed at nine o'clock, P. M., and prohibiting all sales of liquors after that hour, &c. Held, that this is a police regulation for the good order and quiet of the city, and within its corporate powers—that it is not in conflict with the constitution and laws of the State, and may be enforced. *Ibid.*

3. *Municipal. Contract. Taxation. Legislative power.* The extension of the corporate limits of a town or city, by the Legislature, is an exercise of governmental power of which the persons newly taken in cannot be heard to complain ; they have no voice in the matter ; no power to resist, nor is any legal right of theirs impinged thereby. An act of the Legislature, therefore, for that purpose, is not in the nature of a contract, and may be changed at the pleasure of the law-making power. *McCallie v. The Mayor and Aldermen of Chattanooga*, 817.
4. *Same. Same. Same.* The Legislature may surrender the power of taxation, in respect to particular lands, in favor of an individual. But the surrender of this, or any of the rightful powers of government, is not to be presumed ; nor is the bestowal of a privilege for a limited time and, without consideration, to be taken as obligatory on the Legislature, against a repeal of the privilege. *Ibid.*
5. *Powers are controlled by its charter. Foreign corporations.* A corporation may sue or be sued, or make contracts in other States, or in reference to property there situated, as well as in the State of its creation, if its charter confers such power. Whenever a corporation makes a contract, it is the contract of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim, are the rights given to it in its charter, and not the rights which belong to its members as citizens of a State. *Talmadge et al. v. North American Coal and Transportation Company*, 837.
6. *Same. Same. By whom its contracts to be made, or acts done.* A corporation is what the incorporating act has made it, and it can do no acts either within or without the State which creates it, except such as are authorized by its charter ; and those acts must, also, be done by the officers or agents, and in such manner as the charter authorizes. *Ibid.*
7. *Same. Effect of limitation in the charter of a foreign corporation. Mortgage.* A foreign corporation can claim no legal existence in this State, except in the recognition, by our Courts, of the charter granted to it by the State in which it exists ; and if there is any prohibition in said charter against mortgaging the real and personal estate of the corporation, there is nothing in the policy of our law that would authorize the Courts to relieve it of that restriction. *Ibid.*
8. *Rule as to construction of charters.* A grant of privileges, by the State, to persons as a body corporate, must be construed in favor of the public and against the grantees, and a prohibition, reservation, or exception in the charter of a corporation will stand in full force, though it destroy or make nugatory all the powers given to the company. *Ibid.*

See CRIMINAL LAW. TAXATION. WITNESSES.

COSTS.

Slander. Code, §§ 3198, 3402. Section 3402 of the Code governs the taxation of costs in actions for slander; and if the verdict is under five dollars the plaintiff shall recover no more costs than damages. If five dollars the plaintiff recovers full costs. *Bates v. Sullivan and Wife*, 632.

See GARNISHMENT. ROADS.

COUNTERFEITING

See CRIMINAL LAW.

COUNTY CLERK.

1. *How made liable for neglect of the duties of his office.* County Court. It is the duty of the County Court to see that the clerk performs his duties., but if this is not done, and the Court makes an application of money, and employs a third person to perform any part of his official duties, the Court cannot recover the amount thus paid, in an action against the clerk or his administrator. It would be the payment of money to do the work of another without his request or sanction, and the law would not imply a promise to pay. *Alexander, Adm'r v. Marshall*, 475.
2. *Same. Question reserved.* Could the County Court in such case, sue the clerk on his official bond, and render him liable for the amount paid out? *Ibid.*

COUNTY COURT.

1. *Power of Quorum Court.* A County Court composed of three or more Justices, has power to transact all the ordinary business of the county, among which is classed the collection of debts and claims due it. *Ezell v. The Justices of Giles County*, 583.
2. *Same. Attorneys. Rule upon for authority to sue.* In matters pertaining to the ordinary business of the county, suits may be authorized by an order of the County Court, composed of three Justices; and such order will be sufficient in discharge of a rule upon the attorney of the county to show his authority. *Ibid.*
3. *Commissioners. Act of 1835, ch. 29, § 3.* The act of 1835, ch. 29, sec. 3, authorizing the appointment of commissioners to receive propositions for the building of a public bridge does not contemplate that they shall receive or complete the contract for its construction; but, only that they shall report their proceedings to the County Court for its acceptance or rejection. *Ibid.*

See ADMINISTRATION. COUNTY CLERK. DEEDS. ROADS. TAXATION.

COUNTY TRUSTEE.

See PRINCIPAL AND AGENT.

COURTS.

See CIRCUIT COURT. COUNTY COURT. CHANCERY. CHANCERY JURISDICTION. JURISDICTION. SUIT.

COVENANT.

See CHANCERY.

CREDITOR.

See ADVANCEMENTS. DEED. PARTNERSHIP. REGISTRATION. TRUST AND TRUSTEE. USURY. WILLS.

CRIMINAL LAW.

1. *Counterfeiting. Indictment. Act of 1842, ch. 48.* Under the act of 1842, ch. 48, which, in substance, is incorporated into the Code, it is not necessary to aver in an indictment for fraudulently keeping in possession, or concealing counterfeit money, or bank notes, that the party charged, did so *with the intent to pass the same*. *Sizemore v. The State*, 26.
2. *Same. Same. Act of 1842 constitutional.* The 9th sec. of the 1st Art. of the Constitution of Tennessee, provides, "That in all criminal prosecutions the accused hath a right, * * * to demand the nature and cause of the accusation against him." This provision does not refer to the *form* of the accusation, but to the accusation itself. It is left to the Legislature to prescribe in what form the crime shall be charged. The act of 1842 does not go beyond this, and is not in violation of the Constitution. *Ibid.*
3. *Same. Not exclusively cognizable in the Federal Courts.* Although the offence of counterfeiting the coin of the United States, or of passing, or keeping it with the intent to circulate it, are offences against the United States, they are not *exclusively* cognizable in the Federal Courts. The Federal and State Governments are separate and distinct. Both are sovereign in the spheres assigned them. The coin of the United States is intended for the use of the people of all the States, and there can be no reason in denying to the States the power of protecting their citizens against the debasement of the universal currency, by the punishment of all the offenders against it within their borders, although the same are offences against the United States, and punishable in the Federal Courts. *Ibid.*
4. *Venue.* It is not essential to the laying of the venue in an indictment or presentment, that the county should be repeated in the body of the

- same. It is sufficient if the county be stated in the caption ; and is then referred to as the county aforesaid, then and there, &c. *State v. Skull*, 42.
5. *Same. Presentments. Code, § 5025.* Section 5025, of the Code provides that it shall not be necessary for an indictment to allege where the offence was committed ; but the proof shall show that it was committed within the jurisdiction of the Court. Although presentments are not, in terms, embraced, it was the intention of the Legislature to include them. *Ibid.*
 6. *Indictment. Throwing down fence.* In indictments for misdemeanors, a substantial description of the offence charged is all that is required. It is proper to pursue, in indictments, the language of the statute creating the offence, but this is not indispensable. An indictment, therefore, for injuring the fence of another, is good, if it charges the offence to have been committed "*unlawfully, maliciously, and wantonly*." *State v. Pennington*, 119.
 7. *Impanelling jury. Court may, for cause, reject a juror, before the jury is sworn.* The Court even in a capital case, has the discretionary power to reject a juror, before being sworn, for improper conduct, or other sufficient cause. *Lewis v. The State*, 127.
 8. *Same. Number of the panel after a juror is discharged.* If, after the jury in a criminal case is selected, one of the number is discharged by the Court, the prisoner is not entitled to a full panel of jurors out of which to fill the vacancy. He is only entitled to the number allowed if the juror had not been selected. *Ibid.*
 9. *Peace officer may arrest on suspicion. Code, § 5087. Murder.* By the common law, a peace officer may make an arrest on a charge of felony, upon a reasonable cause of suspicion, without a warrant, although it should afterwards turn out that no felony had in fact been committed ; and if such officer is slain in attempting to make the arrest, by the party charged, it will be murder. *Ibid.*
 10. *Same. Not bound to make known the cause of arrest.* When a party is taken in the commission of an offence, or upon fresh pursuit, or when the officer is violently assaulted upon coming up with the accused, the officer is not required to make known his authority or the cause of the arrest, and if he is slain it is murder. *Ibid.*
 11. *Same. Same. Code, § 5038.* This principle of the common law is not changed by force of the word "*escape*" used in the Code. It is not here used in its technical, but in its popular sense, which is to "*flee from*," &c. *Ibid.*
 12. *Murder in the first degree. Premeditation.* The distinctive charac-

teristic of murder in the first degree is *premeditation*. Premeditation involves a previously formed design, or actual intention to kill. But such design, or intention, may be conceived and deliberately formed in an instant. It is not necessary that it should have been conceived, or have pre existed, in the mind any definite period of time anterior to its execution. The length of time is not of the essence of this constituent of the offence. *Ibid.*

13. *Same. Mitigating circumstances. Commutation of punishment. Code, § 5257.* Section 5257 of the Code changes the rule by which the opinion of the jury finding mitigating circumstances was made obligatory on the Court; and leaves it, upon the recommendation of the jury, in the sound discretion of the Court, upon an unbiased and discriminating survey of the whole case, to give effect to that recommendation, or to refuse to do so, as the ends of public justice may seem to dictate. *Ibid.*
14. *Indictment. Record of its being returned into Court. Amendment. Code, § 5242.* In misdemeanors, the minutes of the Court should show that the indictments are returned into Court. But an omission to do so is not fatal. If brought to the notice of the Court, by motion to quash or otherwise, at the term the indictment is found, the defect should be supplied; if at a subsequent term the entry should be made *nunc pro tunc*. By section 5242 of the Code, this objection is not available after verdict. *State v. Willis, 157.*
15. *Grand Juror. Witness. Code, § 5089.* The provision of the Code, § 5089, exempting a witness from a prosecution for any offence in relation to which he has testified before the grand jury, does not extend to and embrace a grand juror, who communicates to his fellow jurors his knowledge of a crime having been committed; and in doing so, voluntarily, implicates himself in the act. *State v. Hatfield, 231.*
16. *Usury. The gist of the offence of usury under our statute is the reception of the money. The mere contract or agreement for the payment of more than the legal rate of interest, is not of itself, while unexecuted, the subject matter of a criminal prosecution. And if the parties, in order to evade the law, go into another State and make the contract of loan, and the usurious interest is, afterwards, received in this State, a criminal prosecution will lie. Murphy v. The State, 249.*
17. *Same.* But if a contract is *bona fide* made in another State, for the payment of money, the rate of interest will be governed by the law of the State in which the contract is made; and in such case the reception of the money in this State—though the rate of interest may have exceeded that prescribed by our law—would not be usury. *Ibid.*
18. *Railroads. Overseers of roads. Signboards. Corporation Code § 1166.* To prevent railroad accidents, among other things it is re-

quired by § 1166 of the Code, that the overseers of every public road crossed by a railroad, shall place at each crossing a sign marked, "Look out for the cars when you hear the whistle or bell," and the County Court shall appropriate money to defray the expenses of said signs. And when a public county road passes through a town, and is used in common by the public and the inhabitants of the town, both as a public road and a street of the town, the corporation is regarded as the "overseer" of such road, within the limits of the town, and, as such, must perform the duties enjoined by law upon the overseers of public roads. The corporation is subject to a criminal prosecution on failure to do so. *State v. The Mayor and Aldermen of Loudon*, 268.

19. *Mayhem. Assault and battery. When defendant may be found guilty of a less offence.* Code, § 5228. By § 5228 of the Code, any person indicted for an assault with intent to kill, or to commit any other felony, may be found guilty of an assault, or an assault and battery; or a defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged, whether it be a felony or misdemeanor. Hence, on an indictment for *mayhem*, the defendant may be found guilty of an assault and battery. *Carden v. The State*, 267.
20. *Limitation of prosecution.* Code, § 4983. If the indictment or presentment be for a felony, the limitation as to felonies applies; and not the limitation as to misdemeanors, although the defendant may be found guilty of a misdemeanor. *Ibid.*
21. *Eaves-dropping.* Eaves-dropping is the nuisance of listening under walls or windows, or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales. *State v. Pennington*, 299.
22. *Same. Eaves-dropping the grand jury.* A person who secretly and stealthily approaches near to the room occupied by the grand jury, while they are engaged in the performance of their duties for the purpose of overhearing what is there said and done by the grand jury, is guilty of eaves-dropping. *Ibid.*
23. *Prosecutor—death of.* The accident of the death of the prosecutor marked on an indictment, pending the prosecution, does not operate as a discharge of the accused. The prosecution goes on as though the death had not occurred. *State v. Loftis et al.*, 500.
24. *Slaves. Selling liquor to.* Spirits cannot be sold or delivered to a slave, under any circumstances, for his own use, not even in the presence, or by permission, of the master. It can only be sold or delivered to a slave for the use of the master, and then the owner or master must be present, or send a written order for the spirits. *Jennings v. The State*, 520.

25. *Same. Character of the order.* To authorise the selling of spirits to a slave for the master, it must be done in his presence, or upon a written order, specifying that it is for himself, and the quantity to be sent. A general, or indefinite order is not sufficient. An order is good, only, for a single transaction. *Ibid.*
26. *A corporation may be indicted.* It is well settled, both in England and America, that a corporation may be indicted. *Louville and Nashville R. R. Co. v. The State*, 528.
27. *Same. Public roads—obstruction of by railroad companies.* Railroad companies may be indicted and fined for obstructing a public highway contrary to the powers granted in their charter. *Ibid.*
28. *Bigamy. Unlawful cohabitation. Code, § 4839.* By the Code, § 4839, a party cohabiting with a second husband or wife, the former husband or wife being alive, is guilty of a felony. This is a distinct offence from that of bigamy, created by the same section. *Finney v. The State*, 544.
29. *Same. Same. Venue. Constitutional law.* By the Constitution, the accused has a right to be tried in the county where the offence is committed. On an indictment for bigamy, the trial should be in the county where the second marriage takes place. For an unlawful cohabitation, the party can be tried in any county where the parties unlawfully cohabit. *Ibid.*

DAMAGES.

1. *Measures of, resulting from fraud.* To entitle a party to recover damages for a fraud in the sale of personal property, against the vendor, he must not only establish the fraud, but, also, some injury or loss to him as the result of the fraud. Both fraud and injury must exist to sustain the action. *Whitson v. Gray*, 441.
2. *Speculative. Evidence.* In an action to recover damages for a fraudulent representation as to the age of a negro woman, it is not competent, as an element of damage, to show that the woman might have given birth to several children more, if she had been as young as, fraudulently, represented to be. This is too remote and uncertain. *Ibid.*
3. *When exemplary, may be given.* In cases of fraud, malice, gross negligence, or oppression, the interest of society and the aggrieved party are blended, and the jury may award exemplary damages—such as not only to recompense the sufferer, but to punish the offender. *Byram v. McGuire*, 530.

See FRAUD. RAILROAD COMPANIES. SALE OF REAL ESTATE. SLAVES.

DECLARATION.

See DEMURREL. PRACTICE AND PLEADING.

DEED.

1. *Takes effect from delivery. Date not essential.* The date is not an essential part of a deed. The deed will be good, although it may have no date, or a false or impossible date, and will take effect from the real time of delivery. *Swan v. Hodges*, 251. ✓
2. *Fraud. Beneficiaries and creditors.* In a contest between creditors and the beneficiaries in a deed of trust, fraud on the part of the maker of the deed, will not deprive the beneficiaries of the security provided for them in the conveyance, unless they have participated in the fraud. *Mills & Co. v. Haines and others*, 332.
3. *Trustee. Act of 1855-6.* It is a familiar principle of equity, that a trust shall never fail for want of a trustee, or by reason of his neglect, or default. And, therefore, a failure of the trustee to comply with the terms of the act of 1855-6, will not impair the validity of the deed. It would furnish a sufficient reason for displacing him, and appointing another, but would not defeat the trust. *Ibid.* ✓
4. *Acceptance by the beneficiaries. Lien.* The creditors for whose benefit a deed of trust is made, do not acquire a lien, or become vested with any absolute right under it until they have accepted the provisions made for them. *Ibid.*
5. *Same. Same. Presumption of Acceptance. Attaching creditors.* In the absence of proof to the contrary, the assent to and acceptance of a deed by the beneficiaries will be presumed. But this presumption will not suffice in a contest, as to priority of liens, between the beneficiaries in the deed and other lien creditors. And if the property conveyed be impounded by other creditors before there is an acceptance of the provisions of the deed by the beneficiaries, they will have priority of lien. *Ibid.* ✓
6. *Revocation of a deed of trust.* If the creditors for whose benefit a deed of trust is made be not privy to the conveyance, and the fact of the existence of such conveyance has not been communicated to them, the deed operates merely as a power to the trustee; and it may be revoked by the maker of the deed, at any time before notice of its execution, to them, and their acceptance of its provisions. *Ibid.*
7. *Sheriff. Tax sale. Act of 1809, ch. 84, § 1.* The power of a sheriff to execute a deed for land sold by his predecessor in office is derived entirely from the statute; and this power by the express terms of the statute, is restricted to the cases when the "sheriff may go

out of office not having executed deeds for land sold by him while in office." In such cases, alone, is the successor empowered to execute the deed. *Wortham et al. v. Cherry*, 468.

8. *Title cannot be re-vested by surrender of.* By the execution and delivery of a deed, the title passes, and the returning of it to the vendor, whatever may be the intention of the parties, will not re-vest the title in him. A re-conveyance is indispensable. *Howard v. Huffman*, 562. ✓
9. *Same. Estoppel.* If the grantee voluntarily destroy or surrender the deed, with the intention of defeating his own title, he would be estopped from setting it up, or showing its contents by parol evidence. *Ibid.* †
10. *Settlement by party on a trustee for himself and family.* A party owning property may convey the same to a trustee, to hold in trust for the support of himself and family during life, with remainder to his children. A court of chancery will sustain such a deed with the conditions and limitations therein contained. *Mills, Adm'r, v. Mills, et al.*, 705.
11. *Same. Payment of debts.* If so provided in the deed, the property or funds conveyed cannot be applied to the payment of any debt contracted by the maker of the deed, after its execution. *Ibid.*
12. *Same. Subsequent deed. County Court.* A subsequent deed, disposing of the property thus conveyed, or an order of the County Court, annulling the first deed, would be inoperative and void. *Ibid.*

SEE CHANCERY JURISDICTION. CONSTRUCTION OF WRITINGS. HUSBAND AND WIFE. LAND LAW. REDEMPTION. SALE OF REAL ESTATE. ASSIGNMENT. CHANCERY.

DEED OF TRUST.

See DEED. ASSIGNMENT. PARTNERSHIP. REGISTRATION.

DEMAND AND NOTICE.

See BILLS AND NOTES. PRACTICE AND PLEADING.

DEMURRER.

Declaration. Statement of plaintiff's interest in the land. Act of 1852, ch. 152. The omission to state in the declaration the extent of the plaintiff's claim, whether the whole, or an undivided interest in the land, is not fatal on demurrer. After judgment, any defects, or imperfections in matters of form, may be amended by the Court in

which the judgment is rendered, or the Court to which it shall be removed by writ of error, or appeal, if substantial justice require it; and if the amendment be in affirmance of the judgment. *Royston et al. v. Wear et al.*, 8.

See CHANCERY JURISDICTION. CHANCERY PLEADING. PRACTICE AND PLEADING.

DEPOSITIONS.

1. *Exceptions to. Practice.* A general objection to the competency of evidence in a deposition, made on the trial, will be available, although no exception is taken to the evidence at the time the deposition is taken. *Borton v. Cope*, 167.
2. *May be read although witness in Court.* Code, § 3837. If the deposition of a witness is taken, under section 3837 of the Code, it may be read, although the witness is present in Court. If the opposite party desires a further examination, he may introduce the witness, treating him as the witness of the party taking the deposition. *Turney v. Officer*, 567.

See EVIDENCE.

DESCENT AND DISTRIBUTION.

1. *Brothers and sisters of bastard, inherit.* Act of 1819, ch. 13. By the act of 1819, ch. 13, the brothers and sisters of an illegitimate child dying intestate, without a child or children, inherit the estate of such illegitimate child. *Riley et al. v. Byrd et al.*, 20.
2. *Same. Common law rule.* By the common law, illegitimates could neither take or transmit by descent, except to their own offspring. They were destitute of inheritable blood. The act of 1819 changes the rule of the common law. *Ibid.*
3. *Case in judgment.* F. died in 1847, intestate, leaving a widow, who also died. He left no children, nor the issue of such; but he left brothers and sisters and their issue. Held, that his brothers and sisters, and their issue, inherit his estate. *Ibid.*
4. *As to illegitimates. Intestacy.* Act of 1861-2, ch. 39. Code, § 2423. If an illegitimate person die intestate, his or her estate, both real and personal, goes, first, to his or her child or children, if any there be; and if none, then, to the husband or wife, as the case may be, if a husband or wife survive; and if not, then to the mother if she is living, and if the mother is not living, then, to the brothers and sisters, by the mother, or their descendants. *Webb and Wife v. Webb et al.*, 68.
5. *As between an uncle and aunt, and grandmother.* The maternal grandmother of a person dying intestate, without issue, as next of kin, suc-

ceeds to the personal estate, in preference to the paternal uncle and aunt. But the paternal uncle and aunt, in preference to the grandmother, succeed to the real estate if inherited from the paternal ancestor of the intestate. *Latimer et al. v. Rogers*, 692.

See SALE OF REAL ESTATE. WILLS.

DISTRIBUTEES.

See CONTRIBUTION.

DIVORCE.

1. *Alimony pendente lite* In a suit for a divorce brought by or against the wife, if she is not possessed of sufficient separate property or means of her own, adequate for her support, and to defray the expenses of the suit, she is entitled, as against her husband, to alimony *pendente lite*, and also to such amount of money as shall be necessary to defray the reasonable expenses of the suit including counsel fees. *Thompson v. Thompson*, 527.
2. *Same. Qualification of the rule.* This doctrine is, however, subject to the qualification that the wife is prosecuting or defending the suit in *good faith*. If it be apparent that her suit is without any just or reasonable foundation, and that her cause is prompted by motives of malice, or oppression towards her husband, no allowance ought to be made to her for any purpose. *Ibid.*
3. *Same. When suit dismissed by the wife.* When the wife voluntarily and understandingly dismisses her suit, the husband cannot, thereafter, be charged with the expenses of suit or counsel fees. *Ibid.*

See APPEAL. FRAUDULENT CONVEYANCES. HUSBAND AND WIFE.

DOMICIL.

What constitutes. To constitute domicile two things must concur; first, residence, and secondly, the intention of making it the home of the party. A man is presumed to hold his domicile until another is obtained; and to constitute this change the *fact* and *intention* must concur. *White et al. v. White et al*, 404.

DOWER.

See HUSBAND AND WIFE. WIDOW.

EVESDROPPING.

See CRIMINAL LAW.

EJECTMENT.

1. *Equitable title.* In an action of ejectment, in a Court of Law, the legal title, only, can be looked to; and, in general, the plaintiff's recovery cannot be resisted on the ground of an outstanding *equitable title*, in a third person, or even in the defendant. *Campbell v. Campbell*, 825.
2. *Deraignment of title—when necessary. Estoppel.* In an action of ejectment where both parties claim title under the same third person, it is sufficient for the plaintiff to prove the derivation of his title from such third person, without deraigning it, regularly. The defendant is *estopped* to gainsay the title of the person under whom both claim to hold. *Worham et al. v. Cherry*, 468.

See DEMURRER. ESTOPPEL. EVIDENCE. LAND LAW. MESNE PROFITS. PRACTICE AND PLEADING.

EMINENT DOMAIN.

See RAILROAD COMPANIES.

ENDORSERS.

See BILLS AND NOTES. INNOCENT PURCHASER.

ESTOPPEL.

1. *When common source of title. Privies in estate estopped.* If parties derive title to real estate from a common source, they are *estopped* from denying the *seizure* and *title* of the original claimant from whom they derive title. When parties, if living, would thus be *estopped*, their *heirs* and *privies* in estate, are likewise *estopped*.
2. *Same. Deraignment of title not required.* In an action of ejectment, if the defendant is thus *estopped* from denying title, the plaintiff is not required to deraign his title any further than to the common source.
3. *What amounts to. When it operates upon heirs.* If the owner of land has knowledge of the fact, that another assumes to be owner of the same, and as such enters into a recognizance, creating a lien on the land in favor of the State; and makes no objection thereto, both parties, as well as their heirs, would be *estopped*, as against the purchaser who acquired the title under such lien. *Wilkins v. May et al.*, 178.

See DEED. EVIDENCE. RAILROAD COMPANIES.

EVIDENCE.

1. *Positive and negative.* If two witnesses are called upon to testify touching the same matter, and one swears that he saw or heard a fact, and the other, who was present, that he did not see or hear it, and both witnesses are equally credible, the affirmative witness is to be believed; but if the witnesses both swear positively—the one that the thing did take place, and the other that it did not—credence is due to the one who has the superior and positive knowledge of the transaction. *Delt v. The State*, 79.
2. *Record, how far evidence.* The record of a cause is not evidence in any other suit, except between the parties to said record, only of the fact of the judgment, and of the damages and costs recovered. *Rhea v. White et al.*, 121.
3. *Same.* *When evidence and depositions a part of the record.* The evidence and depositions taken in a cause, are no part of the record, unless made so by a bill of exceptions, &c. *Ibid.*
4. *When conflicting.* *Chancery.* If the complainant, who is actor, fails to make out his case by sufficient proof, he is not entitled to the interposition of the Court in his favor. *Humphreys v. McCloud*, 235.
5. *Same.* *Same.* *Compromise.* If the terms of compromise of a suit pending in Court, are not put in such form as to preclude all future controversy as to the true import of the agreement, this negligence cannot be made a ground upon which to invoke the active interference of a Court of Equity. *Ibid.*
6. *Assault and battery.* *Character of the prosecutor.* On the trial of an indictment for an assault and battery, the character of the party assaulted is not admissible as evidence, except when involved in the *res gestæ*. *Harman v. The State*, 243.
7. *When character a part of the res gestæ.* *Self defence.* When it is shown that the defendant was under reasonable fear of his life or great bodily harm, from the prosecutor, the prosecutor's temper, in connexion with previous threats, is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defence in which the defendant placed himself. *Ibid.*
8. *When the proposition embraces legal and illegal evidence.* If a party proposes to introduce certain proof, and his proposition contains an admixture of illegal matter, with legal, it justifies the Court in rejecting the evidence altogether. *Ibid.*
9. *Usury.* *Production of the note.* In a criminal prosecution for *usury*, it is not necessary to produce the note, in evidence, given for the loaned

money. The note, if produced, may not show the *usury*, and it must be made to appear by extrinsic parol evidence. *Murphy v. The State*, 249.

10. *Estoppel. Admissions.* All persons, being *ad juris*, are required to *speak out* when an assertion is made, or an act done, in their presence, or with knowledge on their part incompatible with their legal rights; and the failure to do so is taken as a tacit admission of the truth of the fact so asserted, or of the right of the person to do the act. *Daugherty and Wife v. Marcum et al.*, 328.
11. *Same. Same. As between relatives.* This principle applies as much between relatives as it does to strangers; and if a statement is made by a mother in reference to a conveyance made to a son, in the presence of the son, which is not controverted by him, such tacit admission has the same effect as if made to a stranger. *Ibid.*
12. *Exceptions to. Practice.* If an objection to evidence be a formal rather than a substantial one—to be available in the Supreme Court, it must have been specially taken in the Court below. *Campbell v. Campbell*, 325.
13. *Parol. Tax Books.* In an action of ejectment, if the statute of limitations is relied on, it is competent to prove, by the tax books, in whose name the land was listed, as a circumstance proper to be looked to by the jury in determining the question whether the defendant claimed to be the owner of the land. The record evidence must be produced; Parol evidence of the fact is not admissible. *Ibid.*
14. *When the admissions or declarations of the assignor of a contract admissible.* Admissions or declarations made by the assignor of a personal contract, or chattel, previous to the assignment, while he is the sole proprietor, and when the assignee must recover through the title of the assignor, are admissible as evidence against the assignee. *Drennon v. Smith*, 339.
15. *Same. Identity of interest.* This rule applies, only, where there is an identity of interest between the assignor and assignee. Thus, the declarations of a former holder of a promissory note negotiated before it was over due, showing that it was given without consideration, though made while he held the note, are not admissible against the endorsee; but in an action by the endorsee of a bill or note dishonored before it was negotiated, the declarations of the endorser, made while the interest was in him, are admissible evidence for the defendant. *Ibid.*
16. *Presumption. Schoolmaster. Rule as to the onus of proof when a schoolmaster is indicted for an assault and battery.* When the relation

of schoolmaster and scholar, or any similar relation is established in defence of a prosecution for an assault and battery, the legal presumption is, that the chastisement was proper, and this, to warrant a conviction, must be rebutted by showing that it was excessive, or without any proper cause. *Anderson v. The State*, 455.

17. *When a witness may give his opinion as to the soundness of a slave.* In an action upon a covenant of warranty of the soundness of a slave, the opinion of a witness as to the slave's condition, founded upon observation and knowledge, is admissible. The witness must first state the facts upon which his opinion is founded, and then he may give that opinion. *Norton v. Moore*, 480.
18. *Bigamy. The second wife a competent witness.* The second wife is a competent witness on the trial of her husband for bigamy, or unlawful cohabitation. *Finney v. The State*, 544.
19. *Same. Declarations of the defendant. Production of the marriage license.* The declarations and confessions of the defendant as to the first and second marriages, are competent evidence without producing the marriage license, or an eye witness. *Ibid.*
20. *Witness, competency of. Principal and surety. Payment.* The principal in a joint and several bond, or in a judgment against several, is not a competent witness, in behalf of the surety, to prove payment of the debt or judgment. *Hurst v. Word et al.*, 564.
21. *Parol to prove or supply a record of another Court.* In a suit pending in one Court oral evidence is inadmissible to supply a defect in the record of another Court, by showing that an order was made or proceeding had in that Court, which the clerk by mistake or through negligence or from other cause, omitted to enter on the record. *Ezell v. The Justices of Giles County*, 583.
22. *Same. Witness. Competency.* If the right of recovery by the plaintiff depended upon the record of another Court, it would be incompetent to establish such record by oral testimony; but if not, and the defendant relies upon his release by the action of the Court, it is no ground of reversal, that a witness was permitted to prove that no such release was made; because this could be shown only by the record, and the evidence did him no hurt. *Ibid.*
23. *Testimony of deceased witness. Record.* If it is sought to reverse the ruling of the Court below, because of the rejection of proof of what a deceased witness swore on a former trial, it is necessary that it be stated in the record what the testimony of the deceased witness was, so as to enable the Supreme Court to see that it was material in the case. *Ibid.*

24. *Principal and agent. When statements of agent competent. Res gestæ.* If the statements of an agent is a narrative of his understanding of a past occurrence, after the transaction has been executed, and constitute no part of the *res gestæ*, they are inadmissible against his principal. *Ibid.*
25. *Slander. General character.* In actions of slander, the plaintiff's general character upon the trait involved in the charge is put in issue, and may be proven; but his general character upon traits not involved in the charge, or special charges, or other crimes, or suspicions and rumors, are not admissible. *Lambert v. Pharis*, 622.
26. *Statements of witness on former trial. Bill of exceptions.* It is not admissible to prove what a witness swore to on a former trial, because his attendance could not be had. This rule applies where the witness is dead. Neither is a bill of exceptions admissible in such case, to prove what the witness stated on the former trial. *Scruggs v. Davis*, 664.
27. *Nominal party competent as a witness. Code, § 3810.* By the Code, sec. §3810, a nominal party to the record is made a competent witness. But if incompetent on other grounds, such as interest, &c., his testimony would not be admissible. *Sewanee Mining Co. v. Best & Bro.*, 701.
28. *Same. Receipt.* A receipt given by a party who has no agency or power in the matter, is, with the acceptance of the money by the person entitled thereto, competent evidence of the payment of the same; but an admission in the receipt that it was in full to date, is not admissible and binding upon the party. *Ibid.*

See ACCOUNTS. ASSIGNMENT. BILL OF EXCEPTIONS. CHAMPERTY. CONTRACT. DAMAGES. DEPOSITIONS. FORCIBLE ENTRY AND DETAINER. FRAUDULENT CONVEYANCES. JUDGMENT. LAND LAW. MORTGAGE. NEW TRIAL. PRINCIPAL AND AGENT SLANDER. STATUTE OF LIMITATIONS. STAY OF EXECUTION. TROVER. WILLS. WITNESS.

EXECUTION.

1. *Levy. Effect of. Title.* The title to personal property, levied on by an officer vests in him, and he is authorized to sell the same at any time, even after the execution is *functus officio*. *Brown v. Allen*, 429.
2. *Same. Waiver. Abandonment.* Nothing less than the satisfaction of the debt, or some recognized act of abandonment, or waiver, either by the creditor or officer, could have the effect to destroy the title vested by the levy, or restore the right of property to the execution debtor. *Ibid.*

3. *Same. Same. Possession.* Nor does the title which vests in the officer by virtue of the levy depend upon the removal of the property from the possession of the defendant in the execution. It may be left with the defendant, or placed in the custody of any other person without affecting his title. Neither is his title destroyed by taking out an *alias* execution, or an order of sale, or by taking a delivery bond on the *alias*. *Ibid.*
4. *Same. Effect of excessive levy.* It is the duty of an officer to levy on property sufficient to make the debt in his hands amply secure against all probable contingencies, but it should not be excessive. Yet, an excessive levy will not vitiate the title of the officer to the property levied on. *Ibid.*
5. *Same. Debtor cannot dispose of the property.* The execution debtor cannot communicate title to property levied on to another person, until the levy is discharged by payment of the debt, or waiver, or abandonment. *Ibid.*
6. *Lien of, relates to its tests.* An execution issued upon a judgment of a Court of Record relates to its *tests*, and binds the debtor's personal property from the time it is awarded. *Peck v. Robinson*, 438.
7. *Lien of execution on justice's judgment. Levy. Code, § 3078.* When an execution issued upon the judgment of a Court of Record, and one upon a justice's judgment, are levied on the same personal property, the execution first levied has priority of satisfaction. *Ibid.*
8. *Lien. Attachment.* This provision of the Code has no application to a levy under an attachment issued by a justice of the peace, and the lien of a court execution, if of older *teste*, has priority over the lien of such attachment. *Ibid.*
9. *Death of the principal. Revivor.* The death of one or more defendants in a judgment, interposes no obstacle to the issuance of an execution without reviving the judgment. The execution is issued in the usual form, and it is the duty of the officer to proceed to collect the debt from the surviving defendants. *Cheatham v. Brien*, 552.
10. *Return of. Sheriff.* The sheriff has the whole intervening period between the time an execution comes to his hands and the return day to execute it; unless by delay the debt might be lost or put in jeopardy; and if his term of office expires before the return day of an execution the only duty imposed on the outgoing sheriff is to deliver over the process to his successor. *Nolin v. Parchmen et al.*, 609.
11. *Same. Same. Sureties.* A sheriff has no power to execute or return an execution after his term of office is at an end; unless

while in office he had begun its execution; and a failure to execute and return an execution in such a case is not a breach of the condition of his bond, so as to charge his sureties. *Ibid.*

12. *Same. Same. Delivery of process to successor.* The neglect of the sheriff to deliver over process remaining unexecuted in his hands, upon the expiration of his official term, to his successor, is not an official omission or neglect, within the condition of his bond so as to charge his sureties. *Ibid.*

13. *Same. Same. Same. Question reserved.* If an execution is placed in the hands of the sheriff, and retained by him with the knowledge and by the express direction of the plaintiff, can any default be imputed to him for failing to execute and return it? *Ibid.*

See JUDGMENTS. LAND LAW. PAYMENT. PRINCIPAL AND SURETY. SALE OF REAL ESTATE. TROVER.

FACTOR AND PRINCIPAL.

1. *Factor has a special property and lien.* A factor has a special property in the goods entrusted to him for sale; and a *lien* on them for his factorage or commission, and may sell the goods in his own name. *Campbell & Co v. Reeves & Breman*, 228.

2. *Same. Factor cannot delegate his authority.* In general, a factor has no power to delegate his authority to another person; it must be executed by him personally, unless authority to substitute another in his stead is expressly or impliedly conferred upon him by his principal. *Ibid.*

3. *Effect of a delegation of his power, by a factor. Conversion. Assumpsit.* If a factor dispose of the goods of his principal, by a delegation of his power to a third person, without the sanction of his principal, or, of a usage of trade, it is a conversion of the goods by the factor, and the principal would have an election either to sue in *trover*, grounding his action on the *tort*; or to waive the *tort*, and recover the value of the goods in an action of *assumpsit*, based upon the breach of the implied contract *Ibid.*

4. *Sub-agent. Liability of.* Whenever the authority to appoint a sub-agent exists, a privity is created between the principal and such sub-agent, and the latter will be held directly responsible to the principal. But if no such privity exists, the sub-agent would be responsible to his immediate employer, and the remedy of the principal would be against his agent. *Ibid.*

FEME COVERT.

See CHANCERY PLEADING. PARTITION.

FORMA PAUPERIS.

See CERTIORARI AND SUPERSEDEAS.

FORCIBLE ENTRY AND DETAINER.

1. *When it lies.* If a party take possession of the land of another, as a sub-tenant, he would occupy the place of the tenant, and be liable to this action. So, if he entered as a trespasser the action would lie; but if he entered peaceably and for himself, without any connection with the owner or tenant, the premises being vacant, he could not be turned out of possession by this action. *Bird v. Fannon*, 12.
2. *Evidence. Bill of exceptions. New trial.* The manner in which the defendant obtains the possession of land being the *gist* of this action, there must be some evidence, upon this material question, in the bill of exceptions, or the Supreme Court will grant a new trial. Such evidence cannot be presumed, when the bill of exceptions states that all the evidence in the cause is set out therein. *Ibid.*
3. *Trustee. Possession.* The action of forcible or unlawful entry and detainer will not lie in favor of a trustee created by a mortgage, or a purchaser under him, neither of whom has had possession of the premises, against a naked trespasser. In such case there is no *privity* between the trustee, or purchaser, and the trespasser; and the latter is not the tenant of either. *Kuhn v. Feiser*, 82.
4. *Same Case in judgment.* A mortgage was executed, conveying a tract of land, to secure the payment of certain debts. The mortgagor remained in possession of the land until his death. After the death of the mortgagor, the trustee sold the land to pay the debts secured. After the sale, the wife removed and left the land in the hands of an agent, who leased it, and the lessee took possession. Held, that the transaction being prior to the Act of 1856, the widow had no interest in the land, and the lessee was a mere naked trespasser; and an action of unlawful detainer would not lie at the instance of the purchaser against the lessee. *Ibid.*
5. *Agreement. Construction of.* By an instrument of writing, the plaintiffs in error specified certain services to be performed by the defendant for which he was "to have the house rent, use of garden, fire-wood, and pasturage for what cows you keep for family use. Mr. A. J. Hall to hold possession until the 25th of December, 1859. and said Hall to have entire control of the premises as agent for Ariand E. Colcord." Held: that Hall was not a mere agent, but took an interest in the premises as the lessee of A. E. Colcord, and was entitled to the possession until the 25th December, 1859, and if wrongfully turned out of possession, could maintain an action of forcible entry and detainer to be restored to the same. *Colcord v. Hall* 625.

See STATUTE OF LIMITATIONS.

FRAUD.

Sale of Land. Damages. If a party get up a proceeding for a sale of real estate for partition, fraudulently, which is void, the measure of damages against him is the purchase money with interest. *Key v. Key et al.*, 448.

See CONTRACT. DAMAGES. FRAUDULENT CONVEYANCES. LAND LAW. MORTGAGE. PARTITION. SALE OF REAL ESTATE. TROVER. TRUST AND TRUSTEE.

FRAUDS, STATUTE OF.

1. *Promise to pay the debt of another. New consideration.* When the promise to pay the debt of another arises out of some new and original consideration of benefit, or harm, moving between the newly contracting parties, it is not a case within the statute of frauds, and need not be in writing. *Mills, Adm'r, v. Mills et al.*, 705.
2. *Same. Effect of answer in chancery.* If a guarantee, within the statute of frauds, is acknowledged and relied on as a defence, by the party making it, in an answer in chancery, the want of a promise in writing is obviated by the statements in the answer. *Ibid.*

FRAUDULENT CONVEYANCES.

1. *Conveyance made to defeat alimony, void. Divorce.* If a married woman file a bill for a divorce and alimony, having at the time a sufficient cause for a divorce, and is induced by fraudulent promises to dismiss her bill, and, thereafter, the husband executes a conveyance in order to defeat her right to alimony, the grantee participating in this fraudulent design, the conveyance is void, and will be set aside, as to her. *Brooks v. Cauchran et al.*, 464.
2. *Same. Cannot stand as security for money advanced.* Where a conveyance is void on the ground of fraud it is void *ab initio*, and will not be allowed to stand as a security to the grantee for advances he may have made, or responsibilities he may have assumed on account of it. *Ibid.*
3. *Fraud in law, and fraud in fact. Effect of.* A conveyance fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under *suspicious* circumstances, or which is only constructively fraudulent. *Alley et al. v. Connell et al.*, 578.
4. *Same. Repayment of purchase money. Lien.* If the deed be void for fraud in fact, the creditor is entitled to avoid it without

repayment to the fraudulent purchaser, of the purchase money. But where it is only fraudulent by construction of law, the purchaser will be protected to the extent of refunding his purchase money, or allowing the conveyance to stand as a security for it. *Ibid.*

5. *Suspicion. Onus of proof.* If the consideration of a deed is impeached by the bill, and the circumstances, though insufficient to establish that it is actually unfounded, are sufficient to cast strong suspicion upon it, it is incumbent on the purchaser to establish the consideration by satisfactory proof. *Ibid.*
6. *Same. Same. Payment. Presumption.* If the fact is proved that the consideration was paid, the presumption of law, in the absence of contradictory proof, is, that the money belonged to the purchaser. *Ibid.*
7. *Consideration paid. Appropriation of same.* When the consideration of a conveyance is paid the purchaser is not chargeable with the duty of seeing to its appropriation. If, therefore, the money paid be misapplied, it does not invalidate the conveyance. *Ibid.*
8. *Deed. Inadequacy of consideration. Chancery.* A deed, with a small consideration, connected with other inequitable circumstances, will be set aside in equity, in favor of a creditor, so far as to let in his debt; and a sale of the land will be decreed, unless the conveyee will advance the difference in amount between the sum paid and the fair value of the land, to be ascertained in some satisfactory mode. *Ibid.*

FREEDOM.

1. *Contract of. Master and slave.* A contract entered into, directly, between the master and slave, for the freedom of the latter, upon a consideration moving from the slave, or from a stranger on behalf of the slave, is valid and obligatory. But an agreement without any consideration, imposes no obligations upon the master; nor confers any rights upon the slave. Whatever may be the obligations of such an agreement, in *foro conscientiae*, it is, in contemplation of law, a *nudum pactum*, and cannot be enforced. *Isaac v. Sliger et al.*, 214.
2. *Same. Trust. Will. Revocation.* After the execution of his will, the testator can dispose of his slave therein bequeathed, by sale, or otherwise. So, he can confer by parol declaration, a present right of freedom upon the slave; or stipulate with his wife that the slave should be free at her death; or she should set him free, and in this way create a parol trust in favor of the slave. In either case, there would be a revocation of the will, *pro tanto*, and the contract for freedom would be enforced. *Ibid.*

3. *Contract. Parol trust.* An agreement between the master and slave, by which the master, for a valuable consideration, conveys the slave by bill of sale to a third person, with the verbal agreement between the slave and such third party, that the slave is to serve him, in consideration of the amount advanced to his master, for a specified time, and then be entitled to his freedom, creates a trust in favor of such slave, which a Court of Chancery will enforce. Nor can the person who thus holds the legal title dispose of such slave to a person cognizant of the facts, so as to defeat his right to freedom. *Isaac v. Farnsworth et al*, 275.

4. *Will. Construction of. Power to sell.* A general and unqualified power to dispose of property bequeathed by will, vests the absolute title to such property in the legatee, although it may be given for life, with remainder over to others. And such legatee would be authorized to dispose of the property thus bequeathed, by gift, sale, or otherwise. The tenant for life would not be a trustee for the remaindermen, and required to hold the proceeds in case of sale in trust for them. Hence, the tenant for life could confer upon a slave thus given, the right to freedom. *Ibid.*

5. *Same. Same. Illustration.* D. made his will, in which he bequeathed his property to his wife for life, with remainder to his children, equally. He vested in her the power to hire or sell the negroes, and to remove them to any other county or State. By agreement with the slave, the widow sold him to S. for three hundred dollars, with the verbal understanding between the widow, slave, and S., that the slave was to serve S. for eight years, and then to be emancipated. Held, that a *parol trust* was created in favor of the slave, and he was entitled to his freedom. *Ibid.*

GAMING.

1. *When the thing wagered may be recovered.* In gaming contracts, when the impending event is undecided, and after the event as against a stakeholder, who has been notified not to pay the thing lost to the winner, and as against the other party who receives the wager after such notice to the stakeholder, the owner may disaffirm the contract and recover his property. *Guthman v. Parker*, 233.

2. *Limitation. Act of 1799, ch. 8, § 4.* The act of 1799, ch. 8, § 4, limiting suits brought for the recovery of money or property lost at gaming, to ninety days from the payment or delivery thereof, has no application to cases where the contract is disaffirmed, and notice given not to deliver the wager. *Ibid.*

GARNISHMENT.

1. *Partners. Notice.* A *garnishment* is in the nature of an attachment,

and upon its service the property, effects, or debt in the hands of the garnishee is in the custody of the law; and beyond the control of, either the garnishee, or the judgment debtor. The service of a garnishment upon one member of a firm that is indebted to the defendant in the execution, is notice to all the members of said firm; and a payment of the debt by a partner, in ignorance of the service of such garnishment, to the debtor, does not discharge the garnishee from liability to the execution creditor. *Arnold v. Linaweaver*, 51.

2. *Costs.* If a garnishment is successfully prosecuted against the person summoned, and the funds in his hands are not sufficient to pay the debt and costs, and the costs of said proceedings by garnishment—the garnishee not having resisted and appealed from the judgment against him—the execution creditor is liable for, and should be taxed with the costs. The garnishee is in no fault, and is not liable for the costs *Ibid.*

3. *Answer of the garnishee. What protects him.* It is the duty of the garnishee to state, in his answer, every fact within his knowledge which had destroyed the relation of debtor and creditor previously existing between him and the defendant. If he fail to disclose a fact, which, if disclosed, would have prevented a judgment against him, he cannot afterwards set up that judgment in bar of a recovery on the debt he owed the defendant, and which he knew had passed into the hands of a third person before he answered as garnishee. *Conner v. Allen*, 418.

4. *Same. Case in judgment.* C. was indebted to A. by note. The note had been transferred to B. by delivery. Judgment was confessed by C. on the note, he knowing that it belonged to B. By mistake, the judgment was rendered in favor of A. against C. The creditors of A. had garnishment served on C, who answered that he was indebted to A. the amount of the judgment, without disclosing the fact that the debt had been transferred and belonged to B. Judgments were rendered against C. on his answer. Held, that the judgments on the garnishments did not discharge C. from his liability, on the judgment, to B. *Ibid.*

GIFT.

1. *Act of 1831, ch. 90, § 12.* By the act of 1831, ch. 90, § 12, a *parol* gift of a slave is void; hence, if a slave is hired to a party until called for, but if not called for the slave to be his, he could not hold said slave under this qualified gift, if the donor die without reclaiming him. *Overton v. Allen, Ex'r*, 440.

2. *Causa mortis. Donor's note.* A donor's own promissory note, pay-

ble to the donee, cannot be the subject of a *donatio causa mortis*. *Brown v. Moore, Adm'r, &c.*, 671.

SEE WILLS.

GRANT.

1. *Presumption of. Priority of Possession.* The presumption that the State has parted with her right, by grant, will arise, if there has been a continued and connected possession of the land, without any *hiatus*, for twenty years, without reference to the manner in which the respective possessions are connected or succeed each other; and without regard to the source from which each claims to have derived his title. The presumption arises, although the possession had been by different persons, without any privity of title or occupation between them. *Scales v. Cockrill*, 482. ✓
2. *Same. Character of possession necessary to raise the presumption.* This presumption will not arise unless there is an actual possession of some part of the land, and if held under a paper title designating the boundaries claimed to, this possession would be, by construction, to the limits prescribed by such paper writing. *Ibid.*
3. *Same. Enclosure.* If the possession is not held under an instrument of writing defining the boundaries, the party can only claim title, by presumption, to the extent of his enclosure; but the character of the enclosure is immaterial. It may be a wall, ditch, fence, hedge, or natural barrier, such as a river, bluff, &c., provided the arrangements and improvements made by him evince an intention to appropriate the natural barrier as one of the boundaries of his possession. *Ibid.*
4. *Same. Hiatus in possession.* The fact that the enclosure was at times down, and persons, as well as stock passed over the land, will not interrupt or break the possession, if the land were still used and occupied for agricultural purposes, either by cultivation or stock raising. *Ibid.*

SEE LAND LAW.

GUARDIAN AND WARD.

1. *Guardian has no power to trench upon principal. Chancery jurisdiction.* If the interest on the fund in the hands of a guardian is not sufficient to afford the means of a competent maintenance and education of his ward, a court of Chancery can authorize him to *trench* upon the principal; but the guardian has no authority to do this unless thus empowered.
2. *Question reserved.* Will the acts of a guardian or trustee, which clearly appear to be for the interest of the ward, or which are such as

the Court would have authorized, be approved and protected by the Court? *Beeler and Wife v. Dunn*, 87.

SEE CONTRIBUTION. SALE OF REAL ESTATE.

HEIRS.

SEE ABATEMENT. ESTOPPEL. SCIRE FACIAS. STATUTE OF LIMITATIONS.

HUSBAND AND WIFE.

1. *Divorce. Maintenance of wife and children. Chancery jurisdiction.* Act of 1835, ch. 26, §§ 18 and 19. Code, §§ 2467, 2468. By the act of 1835, ch. 26, §§ 18, 19, the substance of which is incorporated into the Code, §§ 2467, 2468, a married woman may exhibit a bill, in any Court having equity jurisdiction, against her husband, for cruel and inhuman treatment; or, such conduct on the part of the husband as may render it unsafe and improper for her to cohabit with him; or, such indignities offered to her person as renders her condition intolerable; or, that he has abandoned her; or turned her out of doors, and refuses or neglects to provide for her. *Nicely v. Nicely*, 184.
2. *Same. Same. Same* Upon either of the foregoing causes being established, the jurisdiction is expressly given to the Court to decree a separation from bed and board forever thereafter, or for a limited time, as shall seem just and reasonable; or to make such other decree in the premises as the nature and circumstances of the case require. *Ibid.*
3. *Same. Same.* The Court has power, whether it decrees a separation from bed and board or not, to make such order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, out of his property, as the nature of the case and circumstances of the parties render suitable and proper. The orders and decrees of the Court may be enforced by sequestering the rents and profits of the real estate of the husband, and his personal estate and choses in action. *Ibid.*
4. *Deed executed, alone, by the wife, is void.* Act of 1715, ch. 28. The act of 1715, ch. 28, substituted a deed, jointly executed by husband and wife, and acknowledged in the form prescribed, instead of the common law modes of conveyance, and in no other way can the wife's freehold estate pass, under our law. It is indispensable that the husband shall be a party to his wife's conveyance; if not, the same is a nullity. *Cope v. Meeks, et al.*, 387.
5. *When the wife is agent for her husband.* The wife, in the absence of her husband, has an implied authority to take all proper and neces-

sary steps to protect his property from destruction or injury, and the husband is responsible for her acts in the execution of that authority. *Cantrell and wife v. Colwell*, 471.

6. *Same. Question reserved.* If the wife employs another as the servant of her husband, who wilfully and tortiously commits an injury, by the assent of the wife, or, if she subsequently approve the act of the servant, would the husband be responsible for the tortious act? *Ibid.*
7. *Tenancy by the curtesy. Remainder and reversion.* A man cannot be tenant by the *curtesy* of a remainder or reversion expectant upon an estate of freehold. *Reed v. Reed et al.*, 491.
8. *Same. Dower.* If a woman, on whom lands descend, endow her mother, afterwards marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the *curtesy* in those lands whereof the mother was endowed—because the daughter's *seisin* was defeated by the endowment. *Ibid.*

See SALE OF REAL ESTATE. STATUTE OF LIMITATIONS. STAY OF EXECUTIONS. TRUST AND TRUSTEE.

ILLEGAL CONTRACT.

See CONTRACT.

IMPROVEMENTS.

1. *Void sale. Lien. Rents.* If a party is put in possession of land by the owner, upon an invalid sale, which the owner fails or refuses to complete; and, in the expectation of the performance of the contract, pays the purchase money, and makes improvements, a Court of Equity will *directly* and *actively*, upon a bill filed against the owner for an account, make restoration of the purchase money, and compensation to the full value of all the improvements to the extent they have enhanced the value of the land, deducting rents and profits; and will hold the land as subject to a *lien* therefor. *Rhea v. Allison, et al.*, 176.
2. *Same. When the lien attaches. Notice.* This equity exists so soon as the purchase money is paid, or the improvements are made, and attaches itself upon the land; and becomes operative against the owner, or a purchaser from him with notice, actual or constructive. *Ibid.*
3. *Improvements. Prior, equity. Removal of incumbrance.* If such owner had purchased the land, and a part of the purchase money remained due, and was a lien upon the same, and his second vendee had

removed said incumbrance by discharging the vendor's lien, to that extent he would have priority, and his lien would be superior to that of the first vendee under the invalid sale. *Rhea v. Allison et al.*, 176.

See LIEN. MESNE PROFITS. SALE OF REAL ESTATE.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

See SALE OF REAL ESTATE.

INJUNCTION.

See PRINCIPAL AND SURETY.

INNOCENT PURCHASER.

1. *How this defence to be made. Answer.* An answer relying upon the defence of an innocent purchaser, must contain all the certainty of a plea. The defendant must aver that his vendor was *seized in fee*, or pretended to be *seized in fee*, &c. *Rhea v. Allison, et al.*, 176.
2. *Transfer in due course of trade. Consideration. Endorser and endorsee.* The suspension or satisfaction of a precedent debt is not a sufficient consideration to give the endorsee of a bill or note the position of a *bona fide innocent purchaser*, as against the equity of a third party, enforceable against the endorser. Such endorsee parts with nothing, sustains no loss, and incurs no liability by reason of the endorsement. *Ibid.*
3. *Same. Same. Applicable to real estate.* The conveyance of land, in payment of an antecedent debt, does not put the conveyee in the position of a purchaser for value, nor entitle him to the protection of a Court of Equity. *Ibid.*

See CONTRACT.

INSOLVENT ESTATES.

Distribution of. Vendor's lien. Administrator. The statutes regulating the distribution of insolvent estates were not intended to affect liens upon any part of the property of the estate, acquired in the lifetime of the deceased. And if a tract of land belonging to an insolvent estate is sold to enforce the vendor's lien, the proceeds of which do not satisfy the debt, such vendor stands upon an equal footing, as to the remainder of his debt, with the other creditors, and is entitled to his

pro rata, on such balance, out of the assets. *Winton, adm'r, v. Eldridge*, 361.

INTEREST.

1. *When allowed on fund due by compromise.* A fund agreed to be paid upon the compromise of a suit, is admitted to be a debt; and, as a legal consequence, bears interest from the date of the compromise unless otherwise provided. *Mills, adm'r, v. Mills et al.* 70.
2. *Same. How computed.* When payments have been made, or debts taken in by the executors or party indebted on the compromise, interest shall be computed according to the rule in case of partial payments, so that the payments shall be first applied in discharge of the interest. *Ibid.*

See APPEAL. CONTRACT. LAND LAW. LEGACIES. TRUST AND TRUSTEE.

JUDGE.

See CONSTITUTIONAL LAW.

JUDGMENT.

1. *Effect of. Trespass quare clausum fregit.* The judgment in an action of trespass *quare clausum fregit* is conclusive upon the parties to the suit, and their privies, upon all matters put in issue in the suit, and may be plead in bar of a subsequent suit touching the same matters. *Warwick v. Underwood*, 288.
2. *How relied on as a defence.* A judgment is equally conclusive as to the matters adjudicated when offered as evidence, if admissible, as if pleaded in bar as an *estoppel*. *Ibid.*
3. *Same. When parol evidence admissible to show what was in issue.* Where the former judgment is general and uncertain, parol evidence is admissible to show what was involved in the issue and settled by the judgment. *Ibid.*
4. *Question reserved.* Is the judgment in an action of trespass *quare clausum fregit*, when the title is put in issue, a bar to an action of ejectment for the same land? *Ibid.*
5. *By default, when final. Jury.* If the defendant in an action fail to appear and defend, within the time prescribed by law, judgment by default may be rendered against him. If the action is founded upon a bond, bill of exchange, promissory note, or a liquidated account signed by the parties, so the amount can be ascertained by a simple calculation upon the papers filed, the judgment may be final. In all

other cases the intervention of a jury is necessary to ascertain the amount due. *The Masonic Educational Association of Chattanooga v. Cook*, 818.

6. *May be rendered on the justice's docket.* It is not essential that a judgment rendered by a justice of the peace should be written on the warrant. It is sufficient, and the judgment is valid, if written upon the docket of the justice rendering the judgment. *Hollins & Co. v. Johnson*, 846.
7. *When void as to one of the defendants.* Act of 1851-2. Code, § 4516. By the act of 1851-2, the provision of which is incorporated in the Code, it is provided that no judgment or decree shall be reversed in the Supreme Court unless for errors which affect the merits of the judgment, decision, or decree complained of: And under this rule a judgment will not be reversed which is valid as to one defendant, but void as to another, upon the application of the former. The rule that a judgment is an *entire thing*, and, therefore, if void as to one party, cannot be allowed to stand as to any of the other parties, is a purely technical one, and falls within said provision. *Bentley v. Hurzthal*, 878.
8. *Payment of, by one joint defendant.* Execution. The satisfaction of a judgment by one of the joint defendants, is an extinguishment of it as to all of the defendants, so that no execution can afterwards be issued thereon. *Anderson v. Saylor*, 551.

See ADMINISTRATION. EXECUTION. MESNE PROFITS. PRINCIPAL AND AGENT. ROADS. SETT-OFF. STAY OF EXECUTION. TROVER. USURY.

JURISDICTION.

1. *Foreign administrators and executors. Settlement.* The Courts of Tennessee have no jurisdiction over foreign administrators and executors in their fiduciary capacity, and cannot call them to an account and settlement. *Beeler & Wife v. Dunn*, 87.
2. *Same. May be compelled to account as trustees.* But if a foreign executor or administrator come within the jurisdiction of our Courts, and bring with him the funds or property of the estate, he may be held to account for the same as trustee for those entitled thereto. *Ibid.*
3. *Power of Court after appeal, or change of venue.* After a cause has been transferred from one court to another, whether by appeal or change of venue, the court from which it has gone cannot proceed further in it. Whatever purports to be posterior to the loss of jurisdiction is, therefore, erroneous, and probably void. *Davis v. Jones*, 608.

4. *Same. Record.* But this principle does not extend to acts purporting to have been done while the court had jurisdiction. Every court is the exclusive judge of its own records, and is competent to make them speak the truth touching its own proceedings. *Ibid.*
5. *Same. Same.* The court cannot, after it has lost jurisdiction of a cause by appeal or otherwise do things omitted to be done altogether, but it may make its records speak the truth as to things that were done, but omitted to be entered. *Ibid.*
6. *Same. Bill of exceptions.* If a bill of exceptions does not show that it contains all the evidence in the cause, the court cannot, at a subsequent term, after an appeal is prayed and granted, amend the same in this particular. It is an act omitted to be done, and not an act done and omitted to be entered of record. *Ibid.*
7. *Circuit and Chancery Court. Code, § 4286.* Section 4286 of the Code does not embrace cases where the Circuit and Chancery Court have concurrent jurisdiction; but suits instituted in a court of law which are properly cognizable in a court of equity, and the defendant fails to demur. *Sevanes Mining Co. v. Best & Brother*, 701.
8. *Same. Same.* In such cases, the plaintiff's suit will not be dismissed; but the Circuit Judge may, at his discretion, transfer the cause to the Chancery Court; or retain and determine it upon the principles of equity; order an account and otherwise perform the functions of a Chancellor. *Ibid.*

See JUSTICES OF THE PEACE. RAILROAD COMPANIES. ROADS. SALE OF REAL ESTATE.

JURORS.

1. *How impeached after verdict. New trial.* After a juror has made himself competent by examination, in a criminal case, and elected by the State and prisoner, to authorize a new trial on the ground of the partiality or prejudice of such juror, the impeaching evidence must be clear and satisfactory, both as to its source and matter, to counteract the oath of the juror. *Mann v. The State*, 373.
2. *Same. How impeaching witness examined. Practice.* When a new trial is asked for, in a criminal case, on the ground of partiality or corruption in a juror, the Circuit Judge should cause the impeaching witnesses to be thoroughly examined in open Court; instead of acting upon their prepared affidavits, though sworn to in Court. *Ibid.*

See CRIMINAL LAW. JUDGMENT. ROADS.

JUSTICES OF THE PEACE.

Equity jurisdiction. Code, § 4124. Interest. If a party tender the pu -

chase money for a tract of land, and demand a deed in pursuance of the contract—but the vendor is unable, at the time, to make the title, and, therefore, does not receive the money—he cannot charge the vendee with interest from the date of the tender until the title is made. The amount being under fifty dollars, the justice of the peace or court trying the cause can hear and determine it upon principles of equity; and a court of equity would not tolerate such a demand. *Williams v. Wilhite*, 844.

See APPEAL. JUDGMENT. STAY OF EXECUTION.

LAND LAW.

1. *Ejectment. Title. Possession.* In an action of ejectment, if the plaintiff shows a legal title, and that the defendant is in possession of a part of the land covered by such title, he is entitled to recover, in the absence of proof, by the defendant, of a superior title in himself, or outstanding in another. *Bowman et al. v. Bowman et al.*, 47.
2. *Same. Grant. Possession. Onus of proof.* If there are tracts of land within the bounds of the plaintiff's grant, excepted by it, the onus of proving the locality of such excluded lands, and that the defendant's possession is within the bounds of the excepted tracts, is upon the latter; and, in the absence of such proof, the plaintiff is entitled to recover. *Ibid.*
3. *Fraud in procuring grant.* The question of fraud in procuring a grant is a matter, exclusively, between the State and grantee; and a mere trespasser, or subsequent enterer, has nothing to do with it. If the State acquiesces in the grant, the legal title to all the lands within its boundaries, not shown to be held by superior title, is vested in the grantee. *Ibid.*
4. *No warranty of title by the State.* The State does not warrant the title to lands granted by her. Persons are permitted to enter any lands subject to entry, but it is done at their risk; and upon failure of title, enterers are not entitled to recover from the State the money paid by them. *State v. Crutchfield's Executors*, 118. ✓
5. *Voluntary payment by the State. Interest. Act of 1844.* The act of 1844 made provision for the refunding of certain moneys paid for lands entered in the Ocoee district, but this act creates no liability on the part of the State to pay the interest on the sums thus refunded. *Ibid.*
6. *Same. Same. Same. Accord and satisfaction.* But if, independent of the act of 1844, the State had been liable for the moneys paid, together with the accruing interest, she, by that act, proposed terms of adjustment, which were accepted by the enterers, and a settlement made according to the terms proposed, which was a satisfaction of all demands against her, growing out of said entries. *Ibid.*

7. *Presumption. Possession. Partition. Grant. Deed.* A grant, deed, or partition of land will not be presumed from the mere assertion of ownership. In order to create such presumption, the claim of ownership must be accompanied with an exclusive, actual, adverse possession, for the length of time required by law to afford the presumption of a grant or title. *Kincaid v. Meadows et al.*, 188. ✓
8. *Same. Same.* If a party, who claims to be the owner of a tract of land, conveys portions of the same, and the adverse possession of the parcels thus conveyed is held by his conveyees, such possession will not extend beyond the boundaries of the deeds; and will raise no presumption of title to that portion of the tract not embraced within the deed. *Ibid.*
9. *Trespass quare clausum fregit. Possession.* In an action of trespass *quare clausum fregit*, the plaintiff is not entitled to recover unless he show an actual possession or a valid title in himself to the premises in dispute. *Snoddy v. Kreutch*, 801. ✓
10. *Presumption of a grant. Statute of limitations.* The statute of limitations cannot operate to confer title, nor can a grant be presumed, unless the party claiming the benefit of the statute, or presumption, proves an actual possession of the land. A mere claim of ownership, or the taking of timber from the land, unsustained by actual possession, will not be sufficient. *Ibid.*
11. *Same. Same.* Nor will the mere parol declarations, acts, or acquiescence of the adverse claimant, be sufficient for this purpose, unaided by the possession of such adverse party. *Ibid.*
12. *Statute of limitations. Possession of some part in dispute.* Possession of land so as to produce the bar, must be an actual possession of some part of the land in dispute. *Ibid.*
13. *Same. Same. Presumption of a grant. Constructive possession.* The party who has the legal title to land, has the constructive possession of the same. And to overcome that possession and perfect title, by operation of the statute of limitations, or create the presumption of a grant to said land, there must be an actual possession of some part of the land in dispute. A possession within the boundaries of a deed covering the land, but without the disputed land, will not be available. *Ibid.*
14. *Presumption of a grant cannot extend beyond the possession.* The possession is the sole foundation of the presumption of a grant, and the title cannot be made to extend beyond that possession. *Ibid.*
15. *Execution. Void and voidable.* If land is sold under an execution either void or voidable, and the plaintiff in the execution become the purchaser, he acquires no title by virtue of his said purchase. *Keeling v. Heard & Hickerson*, 592.

16. *Same. Payment.* Payment extinguishes a judgment and execution as between the parties; and if land is sold by virtue of an execution thus extinguished, and purchased by the plaintiff, he acquires no title to the land. *Ibid.*
17. *Same. Same. Redemption.* If a party redeems land from the purchaser, he is substituted, by the redemption laws, to the rights of the purchaser, and acquires no better title to the land than he possessed. If, therefore, the execution under which land is sold, has been paid, and the plaintiff, by himself or agent, become the purchaser, and the land is redeemed by another creditor, neither the purchaser nor the party redeeming acquire, any title. *Ibid.*
18. *Evidence. Boundary. Declarations of former owners.* For the purpose of ascertaining the true line of a disputed and uncertain boundary between adjacent tracts of land, the acts and declarations of the former owners and proprietors which took place and were made during such ownership, especially if accompanied with possession, conducing to establish the common line, are admissible as original evidence. *Davis v. Jones*, 608.
19. *Same. Same. Same.* This is so, whether such owners be dead or living—competent or incompetent as witnesses in the controversy. They do not stand upon the same footing as the declarations of third persons. *Ibid.*
20. *Boundary. Navigable Streams.* The owners of land upon navigable streams, have title to ordinary low water mark; and to the centre of streams not navigable; even when the title papers call for a corner on the bank, above low water mark, unless it is shown that a line was run and marked on the bank as the true boundary. *Martin v. Nance, et al.*, 649. ✓
21. *Same.* To control the description of land in a deed or grant it must be shown that monuments of boundary were made at the time of the execution of the deed or grant. *Ibid.*

See FRAUD.

LEGACIES.

1. *Interest on.* A legacy given generally out of the personal estate, without the specification of any time of payment by the testator, bears interest from the expiration of one year next after his death. The executor is allowed that time for the collection of the effects. *Mills' Adm'r, v. Mills, et al.*, 705.
2. *Same.* A legacy severed from the rest of the testator's estate

and specifically appropriated for the benefit of the legatee, bears interest from his death. *Ibid.*

8. *Same.* A legacy charged on lands yielding immediate profits, or given out of a personal estate bearing interest or yielding dividends, will carry interest from the death of the testator. *Ibid.*

SEE ADVANCEMENTS. CHANCERY JURISDICTION. /

LEVY.

SEE EXECUTION.

LIEN.

- 1 *Vendor's.* In an application to enforce, not necessary to show title.

Upon application to a Court of Equity, by a vendor, to enforce his lien for the purchase money, it is not incumbent upon him to file the evidences of his title. The vendee cannot resist the application, for an insufficient title in the vendor. But the vendor would not be entitled to receive any portion of the purchase money remaining after selling the lot, in the absence of a good and indefeasible title. *Hurley et al. v. Coleman, et al.*, 265.

2. *Priority. Attachment. Lis pendens.* A. held an equitable title to a tract of land. He executed a mortgage to the same to B. and C., his endorsers, to secure them in their liability for him. He subsequently sold the land and transferred the title bond to D.—there remaining a balance of the purchase money unpaid. To secure this, A. executed a deed of trust to a slave, which had been, previously, conveyed by deed of trust, but the debts therein secured had been paid, except a balance of \$140. B. and C. filed a bill to foreclose their mortgage, and, also, to have the equity of A. in the slave applied to any balance due them remaining unpaid from the proceeds of the land. D. filed a cross-bill, and attached the slave. B. and C. were not judgment creditors: and D. did not state proper grounds for an attachment in his bill. Held:

1. That B. and C. were entitled to have satisfaction of the money they had paid as endorsers, out of the land. The proceeds of the slave to be applied to the payment of the \$140, and the remainder of the purchase money due on the land.

2. If B. and C. had been judgment creditors, and had had their execution returned *nulla bona*, their suit would have fixed a lien upon the equitable interest of A. in the slave, by the principle of *lis pendens*, which would have priority over the lien of the attachment of D., even if the latter had been regular.

3. B. and C. not being judgment creditors, and the attachment of D. having been irregularly issued, they are to be regarded as general creditors, and equally entitled to the equity of A. in the slave, after satisfying the liens created by the deeds of trust. *Acuff, et al. v. Rice, et al.*, 298.

3. *Assignment of the purchase money.* Where the legal title to land sold has been conveyed to the purchaser, the assignment or transfer by the vendor to a third person, of a note taken for the purchase money, does not carry with it to the latter the implied lien of the vendor. *Thompson, et al. v. Pyland, et al.*, 587.

4. *Same.* But where the vendor has not parted with the legal title, or where he has taken a mortgage, or has retained an express lien by agreement, the lien accompanies the assignment of the purchaser's note for the purchase money. *Ibid.*

5. *Same.* If the purchaser of real estate execute his notes for the purchase money, and receive a deed, which, on its face, reserves an express lien for the security of the same, the effect of such provision is to create an express lien, which follows the notes in the hands of the assignee. *Ibid.*

6. *When part of the lands have been sold by the purchaser.* If real estate is sold, and notes given for the purchase money, and the purchaser subsequently sells a portion of the same, reserving to himself a part which he afterwards sells, the first purchaser has a right to insist that the lands of the last purchaser shall be first subjected to the discharge of the vendor's lien. *Ibid.*

7. *Improvements made on the lands of a feme covert.* The husband cannot himself charge the real estate of his wife for monies expended by him in making improvements thereon; neither can a mechanic, who expends his money and labor on the wife's property, at the instance of the husband alone. In such a case, the mechanic's lien cannot be enforced. *Knott et al. v. Carpenter et al.*, 542. ✓

8. *Vendor's Mortgage.* The vendor's lien has priority of satisfaction over the claim of a party who advanced to one of two joint purchasers, money to be applied to the payment, in part, of the purchase money, and took a mortgage on the interest in the land of such joint purchaser. The taking of the mortgage shows that the loan was intended to create a debt against the borrower, and that it was not considered as a payment towards the land. *Cox v. Carson et al.*, 607.

SEE DEED. EXECUTION. FACTOR AND PRINCIPAL. FRAUDULENT CONVEYANCES. IMPROVEMENTS. INSOLVENT ESTATES. PARTNERSHIP. REGISTRATION. SALE OF REAL ESTATE. TRUST AND TRUSTEE. WAIVER.

LIS PENDENS.

SEE LIEN.

LIVERY STABLES.

SEE TAXATION.

MASTER AND SERVANT.

1. *Master's liability for the acts of his servant.* A master is generally liable to third persons, in a civil suit, for the tortious or wrongful acts of his servant, if these acts are done in the course of his employment in the master's service; and this is so, if the master did not authorize or know of the act, or even if he forbade or disapproved it *Cantrell and wife v. Colwell*, 471.
2. *Same. Ratification of servant's acts.* The master is not answerable for the wilful and unauthorized acts of the servant, if they are done, not in the execution of, but altogether aside from the authority given by the master, unless they are subsequently ratified or adopted by him, for his own benefit. *Ibid.*
3. *Liability of master for acts of slave, or servant.* The master is liable for the acts of his slave, or servant, if the act is done by his express command, or with his approval, or in his presence, without his forbidding it; or, if it be subsequently ratified by him, whether it be for his detriment, or his advantage. *Byram v. McGuire*, 530.
4. *Same. When master is said to be present.* If the master is near at hand when an act is done, although not *actually* present, and must have known that the act was being done, he is held to have been present, and liable accordingly. *Ibid.*

MAYHEM.

SEE CRIMINAL LAW.

MECHANIC'S LIEN.

SEE LIEN.

MESNE PROFITS.

1. *Right of executor to sue for. Will.* An executor cannot maintain an action for *mesne profits*, although he may, by the will, be clothed with power to sell the land and divide the proceeds among the legatees. *Brown & Smith v. McCloud*, 280.
2. *Same. Same. Possession.* Rents and profits are incident to the

ownership of the land, and the remedy for *mesne profits* belongs exclusively to the person having title to the land. An actual possession of the land is not sufficient of itself, without title, to authorize a party to sue for *mesne profits*. *Ibid.*

8. *Ejectment. Judgment.* The judgment in an action of ejectment settles the plaintiff's right to recover in an action for *mesne profits* to the date only of the demise laid in the declaration; but the rents and profits may be recovered for the whole time the possession has been wrongfully held by the defendant, unless the statute of limitations is pleaded in bar. *Avent v. Hord*, 458.
4. *Limitation, Statute of.* In an action for *mesne profits*, brought within three years after the termination of the action of ejectment, if the statute of limitation is pleaded, the plaintiff is entitled to recover the rents and profits from the date of the demise laid in the declaration until the possession is surrendered. The recovery is not confined to the period of limitation from the institution of the suit. *Ibid.*
5. *Improvements. Set off.* Code, § 3261. By the Code, § 3261, permanent and valuable improvements made on land by a party who has been holding possession in good faith and under color of title, may be set off against the rents and profits. *Ibid.*

MORTGAGE.

1. *Parol defeasances. Evidences. When title re-vests.* A deed for land, absolute upon its face, may be converted into a mortgage by parol evidence; and a Court of Equity will enforce the trusts and conditions annexed thereto. Thus, if a party under arrest, execute a deed to a third person to qualify him to become his bail, and to save him harmless as such, with the verbal agreement that the conveyee is to hold the land only so long as is necessary for these purposes, such deed is a mortgage; and if the risk is never incurred, or the mortgagee is saved harmless by the appearance of the mortgagor, the title reverts to the mortgagor. *Nichol et al., v. Cabe et al.*, 92. ✓
2. *If executed for a fraudulent or immoral purpose.* If such deed is made for a fraudulent, criminal, or immoral purpose; or, to enable the parties to do any act in violation of law, or contravene any rule of public policy, the Courts will not interpose to grant relief; but will leave them, without redress, where their fraudulent conduct has placed them. *Ibid.*
3. *Same. Evidence must be clear.* To repel a party that has been wronged, from the Courts, without redress, the fraudulent, criminal, or immoral purpose must be, clearly, made to appear. Presumptions will not be strained to defeat equity and justice, by closing the doors against the injured. *Ibid.*

4. *Same. Who affected by fraud.* If a party has been guilty of such conduct as would repel him from the Courts, without redress, his widow and heirs would also be repelled. *Ibid.*
5. *Sale with right to re-purchase.* At a Clerk and Master's sale, to pay debts, the relation of mortgagor and mortgagee may be created by an agreement at the time of the sale, or anterior thereto, that the creditor should become purchaser, and hold the property as security for the debt. And at the same time, the right to re-purchase, instead of a mortgage, if the parties so intend, may be retained by stipulation. *Nickson v. Toney et al.*, 655.
6. *Same. Proof must be clear. Parol evidence.* To establish either the one or the other, by parol evidence, in the face of a decree and absolute purchase, the proof must be cogent and clear. *Ibid.*
7. *Same. Voluntary promise. Consideration.* A mere voluntary promise made by the creditor after the sale and purchase, and not cotemporaneous with, or anterior to it, nor based upon some new and solid consideration, cannot clothe the debtor with any title. *Ibid.*

See CHANCERY. CHANCERY JURISDICTION. CORPORATIONS. LIENS.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

When misconduct of the plaintiff will affect his recovery. If the conduct of the defendant is the immediate cause of the plaintiff's loss, any negligence of the latter, if remote, and not at the time of the injury done by the defendant, will not affect his right of recovery. *Byram v. McGuire*, 580.

See TRUST AND TRUSTEE.

NEW TRIAL.

1. *Surprise. Practice.* The affidavit of a party, stating that he was taken by surprise, by the testimony of a material witness, whose statements he can disprove, unsupported by the affidavit of the witness by whom he can disprove them, is not sufficient to authorize the granting of a new trial. The affidavit of the person possessing the knowledge, or, at least, the affidavit of some disinterested individual to whom the information was communicated, should be produced. *Price v. Jones*, 84.
2. *Practice. Cumulative evidence.* If a witness is offered, and is not in a condition to give evidence, in consequence of intoxication, and is

afterwards offered, it is not error, for which a new trial will be granted, to refuse to permit him to be examined, unless it is shown that he was so restored to his reason as to be capable of testifying; and if his evidence is cumulative. *Kincaid v. Meadows, et al.*, 188.

8. *Not granted if there is any evidence to sustain the verdict.* If there is any evidence to sustain the verdict, a new trial will not be granted by the Supreme Court. *Walker v. Galbreath & Gambrel, adm'rs*, 315.

4. *Practice.* The discretion of a Circuit Judge in granting a new trial cannot, properly, be revised by the Supreme Court. *Huggins & Ransom v. Moore et al.*, 426.

5. *Cumulative Evidence.* A new trial will not be granted upon the affidavit of a witness who was examined in the cause in which he shows he will greatly strengthen his testimony. It would show negligence on the part of the party introducing him; and, if touching matters about which he testified, would be cumulative. *Martin v. Nene et al.*, 649.

See FORCIBLE ENTRY AND DETAINER. JURORS.

NEXT FRIEND.

See SALE OF REAL ESTATE.

NOTICE.

See BILLS AND NOTES. GARNISHMENT. IMPROVEMENTS. RAILROAD COMPANY. REGISTRATION.

NUISANCE.

See WATERCOURSE.

OFFICER DE FACTO.

See CONSTITUTIONAL LAW.

PARTIES.

At law the suit must be in the name of the person who has the legal interest. In the legal forum, whether the contract be express or implied; or whether it be by parol, or under seal, or of record, suit must be brought in the name of the person in whom the legal interest is vested, notwithstanding, by the terms of the contract, the beneficial interest may be vested in another person. *Gwinther v. Gerding*, 197.

SEE ADMINISTRATION. BILLS AND NOTES. CHANCERY PLEADING. ROADS. SLAVES.

PARTITION.

1. *Cannot be made by a foreign court. Conflict of laws.* A foreign court cannot, by its judgment or decree, pass the title to land situate in another country; and, consequently, a partition of lands lying in this State cannot be made by the courts of another State. *Johnson v. Kimbro et al.*, 557.
2. *Can not be set aside by adults. Fraud. Feme covert.* If a petition is presented by adults for a partition of lands, in which minors are interested, praying for a division in a certain manner; and the partition is made in conformity to their wishes, they cannot be heard to object to it, although, as to the minors, it may be void, and would be set aside upon their application. And if the object in setting aside said partition, is to defeat the succession of the next of kin of the infants, it would be a gross fraud; and would not be permitted even in favor of a complainant who is a *feme covert*. *Latimer et al. v. Rogers*, 692.

See CHANCERY JURISDICTION. LAND LAW. RAILROAD COMPANY.
ROADS. SALE OF REAL ESTATE.

PARTNERSHIP.

1. *How claims of creditors worked out. Lien.* The general creditors of a firm have no lien upon the partnership assets if the partners themselves have none. The claim of the creditors must be worked out through the equities of the partners; and if they have none, the creditors can have none. *Fain, Adm'r v. Jones, Adm'r*, 308.
2. *Lien. Chancery. Rights of an attaching creditor, and one owing the debtor.* If merchandize is placed in the hands of a firm for sale, the owner of such merchandise being indebted, at the time, to the firm, in a contest between the firm and an attaching creditor of the owner, the firm is entitled to priority of satisfaction of their indebtedness; and, *a fortiori*, would this be so if the merchandise was placed in the hands of the firm in payment of their indebtedness. *Ibid*.
3. *Dissolution. Notice to previous dealers.* Persons who have had previous dealings with a firm, must have *actual* notice of its dissolution before they are deprived of their right to hold all its members responsible for the contract of one, made in good faith, in the name of the firm. *Kirkman & Ellis v. Snodgrass*, 370.
4. *Deed of Trust. Dissolution.* Either partner may, during the existence of the partnership, make a valid assignment of the goods of the firm, to secure debts due therefrom; but if the partnership, by mutual consent, is dissolved, and the debts, accounts, and goods placed in the hands of a third person, to wind up and settle the firm business, neith-

er partner can, thereafter, make a valid disposition of them. *Mygatt & Co., et al. v. McClure & Roberts et al.*, 495.

5. *Lien. Election. Firm debts are joint and several.* The debts of a firm are joint and several, and the individual property of its members is as much bound by a judgment against the firm, as the firm property. Hence, the judgment creditor has his election to enforce payment out of the individual or firm means. *House et al. v. Thompson et al.*, 512.
6. *Same. Same. Assignment of Judgment.* This right of election extends to the assignees of the judgment. If the assignees are creditors of the firm, and have received an assignment of the firm effects to secure them, their right to enforce payment of the judgment out of the individual means of a member is not, thereby, affected. *Ibid.*
7. *Same. Firm creditors have no lien on the partnership effects.* There is no lien, or other equity, in favor of firm creditors upon the partnership effects. They stand upon an equality with the individual creditors. The partners themselves have the right to require the application of the partnership property to the payment of the firm debts, so that any lien or equity the creditors have is to be worked out through, and is dependent upon, that of the partners. *Ibid.*
8. *Same. Same. When a creditor has two funds out of which he can make his debt.* If one creditor has a right to go upon two funds, and another upon one, both having the same debtor, and the funds are the property of the same person, the first shall take payment from the fund to which he can exclusively resort, so that both may be paid. But this rule is confined to cases where creditors have the same debtor, and the funds are the property of the same person. *Ibid.*

See BILLS. NOTES. CONTRACT. GARNISHMENT.

PAYMENT.

1. *Presumption of, from settlement.* A settlement with a party for his services for a particular month or other period of time, is *prima facie* evidence of payment for all labor or services previously performed by him. To raise the presumption of payment, it is not necessary that there should have been a general settlement of all accounts between the parties. *Shuman et al. v. Clater*, 445.
2. *Constable. Execution.* If a constable or other officer pay an execution in his hands to avoid a motion against him, he cannot thereafter run an *alias* execution, and enforce payment of the debt to reimburse himself. *Burt v. Thompson & Warren*, 534.

3. *Same Assumpsit.* Neither can such officer sue the original debtor in *assumpsit*, and recover the amount so paid. It being a voluntary, officious payment, the law does not imply a promise, upon which to found the action. *Ibid.*

See CHANCERY JURISDICTION. DEED. FRAUDULENT CONVEYANCES. JUDGMENT. LAND LAW.

PLEADING.

See PRACTICE AND PLEADING.

POSSESSION.

See CHAMPERTY. CONTRACT. EXECUTION. FORCIBLE ENTRY AND DETAINER. GRANT. LAND LAW. MESNE PROFITS. REDEMPTION. STATUTE OF LIMITATIONS. WATER COURSE.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT.

PRACTICE AND PLEADING.

1. *Witness intoxicated. When he may be introduced.* If a witness becomes intoxicated, and is not in a condition to be examined, the Court has the discretionary power to refuse to permit him to give evidence. But if the witness is in a condition to testify, before the cause is closed, the Court may permit him to be examined at any time during the progress of the trial, when he is shown to be in a condition to give evidence. *Kincaid v. Meadows et al.*, 188.
2. *Demurrer. Plea Answer. Code, §§ 4818, 4819, 4821.* By sections 4818 and 4819 of the Code, the defendant in a suit cannot avail himself of a want of jurisdiction in the Court, except he do so by plea or demurrer. And by section 4821 the filing of an answer is a waiver of objection to the jurisdiction of the Court. *Kirkman & Ellis v. Snodgrass*, 870.
3. *Same. Must be special. Code, § 2984, applies to all Courts.* By section 2984 of the Code, demurrers for formal defects are abolished, and those for substantial defects only are allowed; and all demurrers shall state the objection relied on. The provisions of this section are general, and embrace demurrers in all Courts, chancery as well as law. *Ibid.*
4. *Declaration. Demand and notice. Endorser.* In an action by the endorsee against the endorser of a bill single, the plaintiff must aver, in his declaration, demand of payment of the maker, and notice of

dishonor to the endorser, or assign some legal excuse for not having done so. This defect is not a matter of form; nor is it cured by a judgment by default. *Harlan v. Dew*, 505.

5. *Demurrer. Code, § 2934.* A demurrer, under § 2934 of the Code cannot be noticed unless the causes of demurrer are set out in it. If a demurrer is filed and the action of the Court not demanded on it, its sufficiency will be taken for granted. *Johnson v. O'Neal*, 601.
6. *Same. Abandonment. Presumption.* If the defendant files several pleas to a declaration, to some of which the plaintiff demurs, and takes issue on the rest; and the defendant goes to trial upon those pleas upon which issue was taken, without demanding the action of the Court upon the others, it will be presumed that he has abandoned them as defences. *Ibid.*
7. *Demurrer. Code, § 8250.* Section 8250 of the Code, which provides in actions of ejectment, that the judgment for the plaintiff, is, that he recover the premises according to the verdict, or, if by default or on demurrer, according to the description in the declaration, does not preclude a party from pleading upon overruling his demurrer; but simply provides for cases where the defendant fails to make any further defence. *Martin v. Nance et al.*, 649.

See ACCOUNT. CHANCERY JURISDICTION. DEMURRER. DEPOSITIONS.
EVIDENCE. JURORS. NEW TRIAL. PRINCIPAL AND AGENT.
SALE OF REAL ESTATE. SCIRE FACIAS.

PRESENTMENT.

See CRIMINAL LAW.

PRESUMPTION.

See ADVANCEMENT. BILL OF EXCEPTIONS. BOND. DEED. EVIDENCE. FRAUDULENT CONVEYANCES. GRANT. LAND LAW. PAYMENT. STATUTE OF LIMITATIONS.

PRINCIPAL AND AGENT.

1. *Measure of fiduciary responsibility.* The measure of fiduciary responsibility, in the view of a Court of Chancery, is the same, whether arising from public or private relations; and, in the absence of *bad faith*, the same fair and equitable principles of adjustment which govern the subject of agency in general, will be applied to, and regulate the accountability of public agents. *Peck v. James*, 75.
2. *Same. Liability of county trustee.* If the county trustee, *bona fide*, receive bank paper in the discharge of his official duty, that is current

and good when received ; but depreciates in value, or becomes worthless before paid out, he is not liable for the same. The loss falls on the State, or county, and not on him. *Ibid.*

3. *Same. How to discharge himself. Evidence. Practice.* In order to discharge himself in such a case, it is incumbent on the trustee to show that he was vigilant in his trust to prevent the loss. He must also prove, otherwise than by his own statements in his bill, that the notes for which he claims a credit, are the same received by him in his capacity as trustee. The Courts should require, by a reference to the master, or otherwise, proof to be made of the identity of the fund, and that the public agent has been guilty of no want of vigilance in endeavoring to secure it, and has used every reasonable means to save the public from loss. *Ibid.*
4. *Special agency.* An agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceed that power. The special authority must be *strictly* pursued. *Rankin v. Eakin & Co.*, 229.
5. *Same. Power of attorney to confess judgment.* If a party constitute another his agent, by written authority, to confess a judgment in his name ; and limits his authority as to time and place, or in other respects, the attorney in fact, or agent, cannot transcend the power conferred and bind his principal. He cannot confess the judgment at a different time than that authorized in the power. *Ibid.*
6. *General and special authorities. Bill of exchange.* General authorities to transact business and to receive and discharge debts do not confer upon an agent the power of accepting or endorsing bills so as to charge the principal. Special authorities to accept or endorse bills are construed strictly. *Sewanee Mining Co. v. McCall*, 619.
7. *Same. Acceptance of bills by Agent.* The power to accept bills, so as to charge the principal, is one of too much importance and too liable to be abused, to be held to exist unless it be given in terms, or be manifestly proper and necessary to effectuate the purposes of the agency. *Ibid.*
8. *Same. Extraordinary emergency.* The acceptance of bills, by an agent, to avoid the suspension of work of great importance to the principal, does not fall within that class of cases of extraordinary emergency, or overruling necessity, in which from the very necessities of the case, an agent is justified in deviating from the authority conferred on him. *Ibid.*

See EVIDENCE.

PRINCIPAL AND SURETY.

1. *Construction of secs. 3665 and 3666 of the Code. Surety of defendants embraced.* The remedy given to sureties by secs. 3665 and 3666 of the Code was designed to apply in favor of sureties, in all cases, irrespective of the attitude of the parties, as plaintiff or defendant. It applies as well in favor of the sureties of the defendant, in cases where, by statute, the defendant is required to give security, as of the plaintiff. *Kincaid v. Sharp*, 151.
2. *Liability of principal and counter security.* The giving of counter security by a plaintiff or defendant, upon notice, does not exonerate the prior surety from any legal liability which had been fixed upon him before his discharge. He is only released from the payment of any costs that may thereafter accrue, with the further right to demand, that in case counter security has been given, the latter shall be *first* made liable to discharge the final judgment which may be rendered in the case. *Ibid.*
3. *Same. Failure to give counter security. Forma pauperis.* If, in discharge of a rule made upon a plaintiff or defendant to give counter security, the party makes the proper affidavit, and is permitted to prosecute his suit in *forma pauperis*, the existing surety is only discharged from the payment of such costs as may thereafter accrue. He is not released from any pre-existing liability. *Ibid.*
4. *Bond. Recognizance.* The statute directs that a bond shall be taken, but a recognizance, or bond of record, is of equal validity and effect. It is not essential that the recognizance shall contain a penalty. It is sufficient, if the undertaking of the surety be that the defendant will pay and satisfy whatever judgment the Court may render in the case. Unimportant omissions will, if necessary, be supplied by intendment of law. *Ibid.*
- b. *Stayer. Execution. The property of the principal must, first, be exhausted.* Code, § 3028. It is the duty of an officer having an execution, to exhaust the property of the principal, both real and personal, before proceeding to sell the property of the surety, or stayer. *Cheatam v. Brien*, 552.
6. *Same. Same. When the property of the principal is encumbered.* If the property of the principal be encumbered, or in custody of the law, or if by the death of the principal it cannot be reached without reviving the judgment against the personal representative, or for any other cause is not amenable to the immediate requirement of the process in the officer's hands, it is his duty to proceed at once against the property of the stayer or other surety. *Ibid.*

7. *Injunction Bond. Is joint and several.* The undertaking of the surety in an injunction bond where there are several complainants, is in law, for the principals, *severally* as well as *jointly*. That is, the surety is bound in effect, that each and all of his principals shall perform and fulfill whatever decree may be rendered in the cause against all, or, either of them. *Kelly v. Gordon et al.*, 688.

8. *Same. Effect of abatement as to one principal.* The abatement, therefore, of a suit in equity, as to one of several joint plaintiffs, by the neglect of both parties to revive, or the discharge of one, upon some ground applicable to him alone, cannot affect the liability of the surety for the surviving party or parties, against whom a final decree may have been properly rendered. *Ibid.*

See EVIDENCE.

PROSECUTOR.

See CRIMINAL LAW.

PUNISHMENT.

See CRIMINAL LAW.

PUFFERS AND BY-BIDDERS.

See SALE OF REAL ESTATE.

QUESTIONS RESERVED.

See ADVANCEMENTS. APPEAL. CHAMPERTY. COMMISSIONER. COMMON CARRIER. COUNTY CLERK. EXECUTION. GUARDIAN AND WARD. HUSBAND AND WIFE. JUDGMENT. RAILROAD COMPANY. REDEMPTION. REGISTRATION. SALE OF REAL ESTATE. TRUST AND TRUSTEE. WILLS.

QUIA TIMET.

Chancery jurisdiction. Anticipated injury. Case in judgment. Bills, *quia timet*, are maintained to prevent anticipated injuries, and not merely to redress them when done. Thus, if a vendee sells portions of a tract of land to different purchasers, the vendor's lien not being extinguished, the first purchaser has a right to compel the extinguishment of such lien by a sale of the other portion of the land, and he may file a bill, *quia timet*, before he has paid, or been called on to pay the debt due to the vendor, or his assignee. *Thompson, et al. v. Pyland, et al.*, 587.

RAILROAD COMPANY.

1. *Eminent domain. When owner under disability. Title, how divested. Jurisdiction.* The right of Eminent Domain is not restricted by any disability of the owner of the land appropriated. When, therefore, the State authorizes the appropriation of private property for the public good, the consent of the owner is not necessary; there is no power of resistance. The owner has the right, alone, to demand, in the mode pointed out by law, the compensation secured by the Constitution. Hence, if a corporation, under the authority of their charter, appropriate the land of a *feme covert* by locating a railroad thereon, and she and her husband petition for compensation and damages, the Court has the power to divest them of their title to the land taken, and vest the *fee* in the company, or order a deed to be made by the husband and wife, with the necessary formalities, as a condition precedent to the receiving of the compensation and damages allowed. *East Tenn. & Va. Railroad Company v. Love and wife*, 63. ✓
2. *Same. Same. How the fund to be disposed of. Husband and wife.* In such a case the wife is entitled to the compensation and damages allowed; and it is the duty of the Court to protect her right thereto, by seeing that the money is paid to, or upon legal authority from her. *Ibid.*
3. *Applicants for compensation must show title. Partition. Estoppel.* To entitle applicants to compensation for land appropriated by a railroad company, they must show title in themselves. But, if tenants in common make a joint application, by petition, in which they allege that partition has been made, they would be *estopped* from afterwards denying said partition, so as to interfere with the title of the company; and it would be unnecessary to show, by other evidence, that the land had been divided, as alleged. *Ibid.*
4. *Same. Rule as to benefits and damages.* The rule established in the case of *Woodfolk v. Nashville and Chattanooga Railroad Company*, 2 Swan, 422, is reviewed and approved. *Ibid.*
5. *Election. Notice of. Acts of 1852 and 1854.* By the second section of the act of 1852, before the County Courts are permitted to take stock in any railroad company, the question of subscription shall be submitted to the qualified voters of the county, and receive a majority of the votes cast, in the affirmative. The act of 1852 is so amended by the act of 1854, as to require a majority of the qualified voters of the county, taking the preceding Governor's election as the basis. This being so, the failure to give the notice of the election required by this act, will not operate to the prejudice, but in favor of the negative voters; and they cannot be heard to complain thereof. Said provision, also, is directory; and a failure to give the notice required by the act

will not vitiate the election and the subscription of stock in pursuance thereof. *Eldridge v. The Rogersville and Jefferson Railroad Company, et al.*, 208.

6. *Same. Same. Means used to carry the election.* If, pending such election, prominent citizens of the county enter into an agreement with the citizens of a civil district to subscribe an amount equal to the tax of that district, to improve the public road leading from that district to the terminus of the railroad, upon condition that the proposition to take stock receives a majority of the votes of such district, such agreement is not in the nature of a bribe, does not contravene public policy, and will not vitiate the election and the subscription of stock in pursuance of the vote. *Ibid.*
7. *Power to construct their road across a public highway.* A railroad company must, if possible, construct their road without any inconvenience to the public; but, if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent the obstruction, the company must build it in a reasonable time, and cannot delay it until their road is completed. *Louisville and Nashville Railroad Company v. The State*, 528.
8. *Charter. Entering town, or city.* The words, *from a town, or city*, used in a charter granted to a railroad company, are to be taken *inclusively*; and in the construction of their road, they have the right to enter the *corporate limits* of such town or city. *The Tenn. & Ala. Railroad Company v. Adams*, 596.
9. *Same. Power of the Legislature.* The Legislature has the power to authorize the building of a railroad within a town or city, or upon a street or other public highway. *Ibid.*
10. *Same. Construction of.* A railroad company can claim nothing that is not clearly given them in the act of incorporation; and any ambiguity in the terms of the charter must operate against the company, and in favor of the public. *Ibid.*
11. *Same. Same. Incidental powers.* This rule of construction is not to deprive the company of the benefit arising from the obvious sense of the charter; and whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant. *Ibid.*
12. *Same. Same. Public road.* The term *public road*, used in the charter of The Nashville and Chattanooga Railroad Company, does not embrace the streets and alleys of a city. *Ibid.*
13. *Same. Same.* The power granted by the charter of a railroad

company to construct their road within a city or town, carries with it, by implication, the power, if necessary, to locate their road upon a street or alley. And if a company be authorized to build a railroad by a straight line between two designated points, the power, by implication, is conferred to run upon along, or across all the streets or roads which lie in the course of such line. *Ibid.*

14. *Same. Same. Obstructions.* The company is allowed to create, in the construction of their road, such obstructions as cannot be avoided; but those that are not absolutely necessary to the making and using of their road, are unlawful. It is the duty of the company to leave public roads, streets and alleys as free from obstructions as they can; and to spare no reasonable expenditure of money or labor for that purpose. *Ibid.*
15. *Same. Suit at common law. Remedy pointed out in the charter.* So long as a railroad company keep within their charter, they cannot be sued at common law, unless it be for injuries inflicted either wantonly, or from neglecting to use reasonable diligence and care. Compensation for land taken, or damage growing out of the use of a street, &c., must be obtained in the mode pointed out in the charter. *Ibid.*
16. *Acts through its officers and agents.* A railroad company acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation. *Wasburn v. N. & C. Railroad Company*, 638.
17. *Same. Power of a Superintendent.* If the Superintendent of a railroad company be clothed with the power and authority of the Board of Directors, so far as regards the control and management of the trains; and all the arrangements connected therewith; he is the immediate representative of the company—the corporate execution officer—and the company is liable for an injury resulting from the negligence or improper order of the Superintendent, just as much as if it had emanated directly from an act of the company in its corporate capacity. *Ibid.*
18. *Servants of. Liability for injuries to, when not in the employ of the company.* The rule that the principal is not liable for an injury to one servant, resulting from the negligence or improper conduct of another servant, does not apply where the servant injured was not at the time of the injury acting in the service of the master. In such case the servant injured is substantially a stranger and entitled to all the privileges he would have had if he had not been a servant. *Ibid.*
19. *Same. Same. Servant absent without leave.* If the servant is improperly absent without leave, but is received on another train of the

company than the one to which he belongs without objection by the conductor, who is intrusted with the duty of excluding all persons not lawfully entitled to be on the train, the liability of the company is not affected thereby. *Ibid.*

20. *Same. Riding free and in the baggage car.* The fact that the servant or other person, is riding in the baggage car with the knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger car. *Ibid.*

21. *Same. Question reserved.* Is the principal that the master is not liable for an injury received by one servant from the negligence of another, while both are acting in the common business of the same master, applicable to servants of a railroad company, in different grades; when they are subordinate the one to the other; or not in the same employment? *Ibid.*

See CRIMINAL LAW. TAXATION.

RECEIPT.

See EVIDENCE.

RECOGNIZANCE.

See PRINCIPAL AND SURETY. SALE OF REAL ESTATE. SCIRE FACIAS.

RECORD.

See EVIDENCE. JURISDICTION.

REDEMPTION.

1. *Effect of the purchaser's death. Administrators and executors.* Upon the death of the purchaser of real estate at execution sale, no conveyance having been made to him for the land by the sheriff, if the land is redeemed by the debtor or his assignee, the redemption money would properly go to the personal representative; and constitute a fund in his hands for the payment of debts, and for distribution under the statute. *Campbell v. Campbell*, 325.

2. *Same. Same. Money to be paid to the personal representative.* This being so, upon the redemption of the land the money should be paid to the personal representative, and not to the heirs. *Ibid.*

3. *Same. When title made to the purchaser.* If the purchaser had been vested with the legal title to the land, by a deed from the sheriff, it would be a conversion of the money bid for the land, into realty; and

would go to the heir, in case of intestacy, and from him the redemption would have to be made. *Ibid.*

4. *Equitable interest. Chancery sale.* Although an equitable interest may be as much subject to redemption as a legal interest; yet, the purchaser of land at a Chancery sale acquires an equitable title, upon the implied condition that the purchase money should be paid at the time stipulated—the payment of the consideration is essential to complete the equity; and if the land is sold, under the decree of said Court, to enforce the payment of the purchase money, the land is not subject to redemption. *Beason v. Porterfield*, 363.
5. *Deed to purchaser. Possession. Rents.* The purchaser of land subject to redemption, can obtain a deed and take possession of the land so as to receive the rents and profits, in the event the land should not be redeemed. *Burk v. Bonner*, 686.
6. *Rents. Debtor remaining in possession.* Instead of ousting the debtor, the purchaser may receive him as his tenant, thereby making the possession of the land his own and collect rents from him; and if the debtor fails to redeem, all right to a reclamation of the rents is forever gone. *Ibid.*
7. *Same. Possession. Question reserved.* If the purchaser of land, subject to redemption, permit the debtor to remain in possession, after his purchase, without any contract for rent, and the land is not redeemed, has he any remedy, either under the act of 1850, ch. 121, or, the law anterior thereto, for the *mesne* profits accruing in the intermediate time? *Ibid.*
8. *Same. Which creditor entitled to rents. Question reserved.* Is the purchaser, who obtains possession of land subject to redemption, entitled to retain the rents accruing during his ownership; and, also, to have his bid and interest from the redeeming creditor; or, is he bound to yield the rents to the redeeming creditor? *Ibid.*

See LAND LAW. TRUST AND TRUSTEE.

REGISTRATION.

1. *Deed of Trust. Subsequent purchaser. Notice of prior incumbrance.* Act of 1831, ch. 90, § 6. A deed of conveyance, bill of sale, or other instrument, takes effect from the time it is registered. And any deed of conveyance, bill of sale, or other instrument, which is last executed, but first registered, shall have priority, unless the subsequent purchaser had full notice of the previous conveyance. The provisions of the act of 1831 include deeds of trust. *Myers and wife v. Ross et al.*, 59. ✓

2. *Same. Same. Notice to agent or trustee.* If the agent or trustee has notice of the *prior* incumbrance or conveyance, it is notice to the principal. Thus, if a subsequent conveyance is made to trustees who have notice of a prior incumbrance; or if a person purchase with notice of a prior conveyance, and agree that another may take his purchase, the latter not having notice of the previous conveyance, the first purchaser is the agent of such sub-purchaser, *ab initio*, and he is affected with notice. *Ibid.* ✓

3. *Same. Same. Case in judgment.* R. executed to M. a deed of trust, to secure a debt due to M. He subsequently executed a deed of trust to N. and I., as trustees, for the benefit of the bank. N. was the counsel of the bank, and I. a bank director. N. and I. had notice of the existence of the prior deed to M. Held, that although the subsequent deed to N. and I. was registered first, the deed to M. was entitled to priority, and should be first satisfied. *Ibid.*

4. *Lien. Contract. Personal chattels. Creditors.* As against creditors, a *lien* cannot be created by contract between the parties, upon a personal chattel in existence at the time of such contract, without registration. This principal does not apply to an agreement that the *future products* of the farm, not *then* in existence, shall be first subject to the satisfaction of the employee's wages. Such a contract does not fall within the letter or spirit of the registration act. *Tedford v. Wilson et al.*, 811.

5. *Certificate of probate—what it must contain.* The omission, by the clerk, in the certificate of probate of a deed, of the words, "the within named," and "with whom I am personally acquainted," is *fatal* to the probate. It is one of the most important requirements as a protection against fraud contained in the formula prescribed by the statute, and cannot be dispensed with. *Fall & Cunningham v. Roper et al.*, 485.

6. *Same. Act of 1846, ch. 78.* The words, "with whom I am personally acquainted," being a matter of substance, their omission does not fall within the provision of the act of 1846, ch. 78. *Ibid.*

7. *Same. Correction of probate. Code, §§ 2081, 2088.* The Code provides that the clerk, on the application of the party interested, may correct any mistake or omission of words in his certificate, and the Register shall record the correction in the proper book of his office, and make a reference to the same on the margin opposite to the original registry of the certificate. This provision of the Code is not retrospective in its operation. *Ibid.*

8. *Same. Same. Question reserved.* As to deeds executed after the passage of the Code, can a defective probate which has been corrected,

be regarded as effectual, as against intervening liens, beyond the date of its correction. *Ibid.*

9. *Title bond. Assignment. Transfer.* The transfer of a title bond may be by a simple delivery, or an assignment in writing. Such a transfer, when the consideration is paid or properly secured, puts the estate beyond the reach of the creditors of the party making the transfer. *Robinson v. Williams et al*, 540.

See SALE OF REAL ESTATE:

REMAINDER AND REVERSION.

See HUSBAND AND WIFE.

RENTS.

See CHAMPERTY. CONTRACT. IMPROVEMENTS. REDEMPTION. SALE OF REAL ESTATE.

RETAINER.

See ADMINISTRATION.

REVIVOR.

See ABATEMENT. EXECUTION.

REVOCATION.

See DEED.

ROADS.

1. *Appeal. Final judgment.* An appeal will not lie, except from a final judgment. Upon the return of the report of a jury of view, to which exceptions were filed, the County Court disallowed the exceptions, and "confirmed said report in all things, except that part assessing the damages, which question of damages the Court left open." No judgment was rendered, upon the confirmation of the report, establishing the road. Held, that this is not a final judgment in the County Court from which an appeal will lie. *Evans v. Shields et al.*, 70.
2. *Parties.* In all contents about roads, the Justices, on the one side, and the party injured or aggrieved in the premises, on the other, are the proper and necessary parties. The County Court cannot devolve the power and trust confided in it, on behalf of the public, to a private and irresponsible individual; and thus in effect, leave the important matter of the establishment and regulation of the public roads of the

county, to be controlled by the interests, prejudices, or resentments of private individuals. *Ibid.*

2. *Jurisdiction. Trial by jury.* The jurisdiction of the roads and other matters of county police, is conferred by statute exclusively upon the County Court: and the Court has no power to refer the determination of facts to a jury. The jurisdiction of the Circuit Court is merely appellate, and the County Court having no power to submit issues of fact to a jury, it cannot be done by the Circuit Court. *Ibid.*
4. *Judgment for costs.* In contests about roads, if private individuals are the parties to the record, no judgment for costs can be rendered, for want of the proper parties. Witnesses and officers of the Court, in such cases, are left to their remedies at law against those by whom they were summoned, or for whom they may have rendered service *Ibid.*
5. *Jurisdiction. County Court. Jury. Appeal.* The determination of all questions connected with public roads, including both matters of law and fact, belongs exclusively to the County Court, with which a jury can have nothing to do. And an appeal lies from the action of said Court, which may operate as a broad appeal, or an appeal in error, according to the necessity of the case. *Beard v. The Justices of Campbell County, 97.*
6. *Same. Appeal. Circuit Court.* On the removal of a cause, involving a contest about a road, from the County, to the Circuit Court, the whole proceedings are open to investigation upon the face of the record, or upon proof, without the intervention of a jury, just as they were in the County Court. The jurisdiction of the Circuit Judge, in such a case, is appellate, only, and if no extraneous evidence is offered, the Court must hear and determine the cause, as if it were before him on a writ of error. *Ibid.*
7. *Parties. Costs.* In suits about roads, the Justices of the County Court and the person or persons aggrieved, are the proper parties; and no private individual can be permitted, or compelled to enter into bond, and be substituted in the place of the Justices. Nor, is the party aggrieved liable for the whole costs. He is only liable for such costs as accrue after he becomes a party to the proceedings. *Ibid.*
8. *Appeal. Code, § 1191.* The provision of § 1191 of the Code, relative to appeals in controversies about public roads, is confined to the parties "interested or aggrieved." It does not embrace every citizen of the county, but only applies to such as are peculiarly concerned, on account of some special interest in the matter not common to others. *Goldman v. The Justices of Grainger County, 107.*

9. *Same. Classification of public roads. Code, §§ 1183, 1184.* The classification of the public roads belongs to the County Court; and all stage roads are put in the first class. If no classification is made by the Court, said roads are to be worked on and kept in the manner prescribed for roads in the first class. In this case, the petitioner applied to the County Court to make the road—on which he was running a two-horse stage—a first-class road, which was refused by the Court. Held, that as the refusal of the Court, and the running of the stage, made it a first-class road, he was not aggrieved by the order of refusal, so as to entitle him to an appeal. *Ibid.*
10. *Minor may be compelled to serve as overseer. Code, § 1195.* It is the duty of the County Court, annually, to appoint overseers of the public roads; but no qualifications as respects age, or otherwise are prescribed. The overseer must be subject to road duty, and must also be one of the hands assigned to work on the road over which he is appointed; but there is no legal objection to the appointment of one who is under the age of twenty-one years; and if a minor is appointed, he is subject to all the "pains and penalties" imposed by law for refusing to serve and for neglect of duty. *State v. Russell, 165.*
11. *Change and acceptance by overseer and hands. Code, § 1228.* If a public road is changed, and the new road is accepted by the overseer and a majority of the hands, so as to bring the case within section 1228 of the Code, the penalty imposed in the previous section is remitted. *Bufford v. Hinson, 578.*
12. *Limitation as to recovery of penalty. Code, § 1237.* For the penalty given for the obstruction of a public road, by section 1237, of the Code, there is a fresh cause of action accruing at the end of each month, from the time of the obstruction, and the statute forms no bar as to the monthly penalties accruing within twelve months. *Ibid.*
13. *Change and acceptance only remit the penalty.* The change and acceptance of a public highway, as prescribed by the Code, does not legalize the obstruction, but only remits the penalty, leaving the party liable, as before, for a nuisance. *Ibid.*

See CRIMINAL LAW. RAILROAD COMPANY.

SALE OF REAL ESTATE.

1. *Partition* A sale of land for *partition*, is a matter of right, provided it shall appear to the Court that it cannot be equally divided among those entitled thereto, or that it would be *manifestly* for their interest that it should be sold. *Ross v. Ramsey, et al., 15.*
2. *Same. Pleading. Practice.* In order to authorize a sale for *par-*

tion, the bill must be framed with that view, and contain the proper averments. The case must, also, be made out by proof. *Ibid.*

3. *Disclaimer. Order pro confesso.* If a bill is filed to divest title to land belonging to minors and adults, as tenants in common, and the adults enter a *disclaimer* in favor of the complainant, a decree divesting their title is proper, as they are *sui juris*, and bound by such *disclaimer*; but if one of the adults fails to defend, and an order *pro confesso* is entered against him—the bill showing upon its face that the complainant is not entitled to the relief he asks—a decree, founded alone upon such order, cannot be made divesting the title of such adult. *Ibid.*
4. *Conversion of. Husband. Descent and distribution.* A sale of land under a decree of Court, is complete upon confirmation of the report of sale, and *not before*. This action of the Court is necessary, to change the character of the property from realty to personalty; and if a *feme covert*, owning real estate, which has thus been sold, dies before the confirmation of the sale, *without issue*, the proceeds of the land go to her brothers and sisters; and not to her husband. Otherwise, if the sale had been confirmed and the *conversion* rendered *complete*. *Moore and wife, ex parte*, 171.
5. *Registration. Execution.* As between the parties to a deed the title passes without registration; and the vendee of land under an unregistered deed, has such an *inchoate* legal title as subjects the land to execution at law for his debts. *Wilkins v. May et al.*, 173.
6. *Same. Recognizance. Lien.* This being so, the *lien* of a recognizance entered into by the vendee would bind the land, and a sale made under a judgment upon the recognizance would vest a valid legal title in the purchaser. *Ibid.*
7. *Contract. Fraud. Election. Case. Deed.* In the absence of all fraud, the rule of law is, that the entire agreement of the parties is presumed to have been incorporated in the deed, or written contract; and if the purchaser has failed to provide for his own security, by appropriate covenants, he is remediless. *Fraud* constitutes an exception to this rule. It vitiates the contract; and the injured party may elect to treat the deed, or contract, as a nullity, and resort to an action on the *case* for the *deceit*. *Gwinther v. Gording*, 197.
8. *Same. Same.* The rule is the same, whether the contract is executed, or executory; or whether the *deceit* is in relation to a thing included in the deed, or something extrinsic; or whether the subject is real or personal property. Hence, an action on the *case* will lie, for a fraudulent representation, as to the *title*, in the sale of the land. *Ibid.*
9. *Same. Same. Case. Damages.* An action on the *case* is of an

equitable nature, in which all the circumstances of the case be looked to be the jury, in estimating the damages. *Ibid.*

10. *When irregular, but to the interest of minors to sustain the sale.* If upon an application to the Court of Chancery by a purchaser of land sold under a decree of Court, to set aside the sale, it appears to the Court that the sale was merely irregular but not void, and a confirmation thereof would be promotive of the interests of the parties, some of whom are minors, the purchaser will be compelled to comply with the terms of sale; and his title will be perfected by a divestiture of title. *Swan v. Newman et al.*, 288.
11. *Sale for partition.* Upon application for the sale of land for partition, upon the ground that a sale will be manifestly for the interest of the owners, it will be sufficient to give the Court jurisdiction and to make the sale valid; if, upon a reference to the master, he takes proof in which witnesses state that a sale will be to their interest, and give reasons or facts to sustain that opinion, and the decree of sale pursues the report. *Ibid.*
12. *Effect of sale by sheriff.* If land is sold at sheriff's sale, and no deed is executed by the sheriff to the purchaser, he is vested with nothing more than a mere equity; and the legal title remains in the debtor. *Campbell v. Campbell*, 325.
18. *Agreement—construction of.* In the construction of an agreement or conveyance, substance rather than form is to be regarded. And if a debtor, whose land has been sold at execution sale, executes an instrument of writing by which he sells and conveys to another, his right to redeem the land sold, and agrees when it is so redeemed, the same is bargained, sold and conveyed to such party; such instrument possesses all the indispensable requisites of a deed of bargain and sale, and its legal effect, although informal, is to invest the party to whom it is executed with a present title in fee simple. *Ibid.*
14. *Infants. Next friend. Practice.* In a proceeding for the sale of real estate belonging to minors, by *next friend*, it is not necessary that the next friend should be selected or appointed by the Court. He would, however, be under its control, and might be removed and another appointed, if the interests of the infants required it. *Kirkman et al., ex parte*, 517.
15. *Jurisdiction. Private Sale.* A sale made of real estate, by the next friend, without a decree authorizing it, and pending a decree requiring the master to sell the same at public auction, &c, is void. But the Court may, with the assent of the purchaser, adopt and confirm such sale, if beneficial to the minors, and the purchaser would acquire a good title. *Ibid.*

16. *Recovery of property paid on void sale. Tender. Contract.* If upon a void contract for the sale of land, personal property is taken in part payment, the vendor may, upon the disaffirmance of the contract, tender to the vendee the personal property received, and thus rescind the contract, as to that also ; but if he fails to make such tender, the law will presume that the parties elected to affirm the contract for the property, and the price of the same may be recovered. *Miller & Counce v. Jones*, 525.
17. *Will. Code, § 3840.* A will, which devises land to certain parties and directs that the same be equally *divided* between them, does not fall within the prohibition of sec. 3840 of the Code, which enacts that "in no case shall property be sold, if it be claimed under a will which expressly directs otherwise." *Hawkins et al. v. England et al.*, 652.
18. *Purchase by guardian. Code, § 3839. Question reserved.* Does sec. 3839 of the Code apply to any other sales of real estate than those made under the chapter containing said section ; and would a guardian be prohibited from purchasing at sales made for partition? *Ibid.*
19. *Sale at auction. Puffers and by-bidders. Fraud.* The vendor of land at public auction may, unknown to bidders, privately depute a third party to attend the sale, and bid progressively for the property on his account ; as a defensive precaution to prevent it from being sold at an under value ; but, if a number of persons are employed as puffers to make fictitious biddings, with the view of taking advantage of the eagerness of buyers, to screw up the price, and not for a defensive precaution, to prevent a sale at an undervalue ; this is an imposition and a fraud ; and avoids the sale. *Davis et al. v. Petway et al.*, 667.
20. *Same. Same. Same.* If the vendor publicly reserve the right to make one bidding and no more, through a person who is named ; and then secretly employs another person to make general and repeated biddings, this is such a fraud as will entitle the purchaser to abandon the contract. *Ibid.*
21. *Same. Sale without reserve.* If, by the advertisement, the property is to be sold *without reserve*, this excludes all interference by the vendor, or others for him, with the right of the public to have the property at the highest bidding ; and, in such case, any arrangement between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale void. *Ibid.*
22. *Same. Purchaser must be misled.* In order to avoid a sale on this ground, it must be shown that under-bidders or puffers, are employed to enhance the price and deceive other bidders ; and that they are in fact misled thereby. *Ibid.*

23. *Partition. Fraud.* If the guardian of minors procure an order for the sale of their land, and have dower assigned, for the fraudulent purpose of preventing persons from bidding for the other portion, intending, indirectly, to become the purchaser, the sale will be set aside and declared void. *Bennett et al. v. Kennerly et al.*, 674.

24. *Same. Purchase money. Rents. Improvements.* Upon setting aside the sale, the purchase money will be refunded to the guardian, and he will be held to account for the reasonable value of the annual rents, with an allowance for permanent improvements made upon the land, to the extent that such improvements have enhanced the value of the property, but not to exceed the value of the rents. *Ibid.*

See CONTRACT. FRAUD. INNOCENT PURCHASER. MORTGAGE.

SCHOOLMASTER.

His power to chastise scholars. Assault and battery. A schoolmaster has the power to enforce obedience to his rules and to use the rod when necessary, but he cannot chastise wantonly and without cause. His chastisement must be proportionate to the offence, and within the bounds of moderation. If excessive, or without cause, the schoolmaster is guilty of an assault and battery. *Anderson v. The State*, 455.

See EVIDENCE.

SCIRE FACIAS.

1. *Bail. Recognizance, or bond. Immaterial statements rejected.* If unnecessary, immaterial, or irrelevant matter be stated in a bail bond or recognizance, it will not vitiate the same, but be rejected as surplusage. Hence, if a recognizance or bond recite that the defendant is to answer the charge of "*negro stealing, the slave of John G. Gaut in the State of South Carolina*," such recital is surplusage, and will not render the same void. The bond to appear, must be enforced without regard to what it may show on its face on the question of jurisdiction. *State v. Adams et al.*, 259.

2. *Same. Same. Construction. Case in judgment.* In the construction of writings, the whole context must be looked to; and words may be rejected, supplied or transposed, to carry out the evident meaning of the parties. The bond was for the appearance of the accused before the Court, "then and there to answer a charge of the State, exhibited against him by indictment, for negro stealing, the slave of John G. Gaut, in the State of South Carolina, and in case of failure, then this obligation is void, otherwise to be in full force and effect." All the words requisite to make this a valid bond are inserted, but they are improperly located; and the Court will reform the mal-collocation of them so as to give the bond its proper force and effect. *Ibid.*

8. *Plea of surrender of the defendant, by the Governor, upon the requisition of the Executive of another State.* The principle, that the surrender of a defendant, in a criminal case by the Governor, upon the requisition of the Executive of another State, discharges his bail, settled in the case of *The State v. Allen*, 2 Hum., 258, is referred to and approved. *Ibid.*
4. *Administrators and Executors. Code, §§ 2271, 2272. Practice.* On the return of a justice's execution against an executor or administrator, "no property found," the justice, on suggestion and application of the plaintiff, his agent or attorney, shall return the papers to the next Circuit Court of his county. And upon said papers *scire facias* shall be issued, and all other proceedings be had for the satisfaction of such judgment, either out of the goods and chattels, lands and tenements, of the defendant, in case he has wasted the assets, or out of the real estate of the deceased. *Hillman Brothers v. Hickerson, Ex'r.*, 575.
5. *Same. Devastavit. Debt. Practice.* When an executor or administrator has been guilty of a *devastavit*, he may be rendered personally liable, either by an action of debt on the judgment, alleging a mismanagement or wasting of the assets, in the declaration, or by *scire facias*, suggesting a *devastavit* of record and obtaining an order for the issuance of the writ. *Ibid.*
6. *Satisfaction out of the real estate. Heirs. Practice.* If it is desired to obtain satisfaction out of the real estate descended to the heirs, a suggestion must be made upon the record of the fact that the real estate has descended to the heirs, as a necessary foundation for a *scire facias* against them. The clerk has no power to issue the writ in vacation. *Ibid.*

SELF DEFENCE.

See EVIDENCE.

SERVANTS.

See MASTER AND SERVANT. RAILROAD COMPANY.

SET-OFF.

1. *When allowed against a note in the hands of an endorsee. Act of 1855-6. Code, § 2918-4.* The law on the subject of set-off was materially modified, and the remedy enlarged by the act of 1855-6, the provisions of which have been incorporated into the Code. By section 2918-4 of the Code, any equities between the defendant and the original party under whom the plaintiff claims, which by law have

attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against the original party may be pleaded, by the defendant, by way of set-off, or cross-action. *Galewood v. Denton*, 380.

2. *Same. Same.* All that is requisite to entitle the defendant to a set-off against the plaintiff, who, by taking the note after it is due, holds it subject to every equitable defence that may be set up against the payee, is, that the right of set-off, or cross-action, is fixed and complete in the defendant previous to and at the time of the assignment of the note, and could not be resisted by the original party—the assignor. No special agreement between the payor and payee before the transfer, is necessary in order that the right of set-off should attach to the note. *Ibid.*

3. *Act of 1852, ch. 259, § 2. Judgment for excess.* The right to a set-off is incidental to, and dependent upon the fact of the plaintiff's having established a right of recovery against the defendant. If this fails, the right of set-off cannot exist; and judgment cannot be rendered under the act of 1852, for any excess that may be found in favor of the defendant. *Brazelton v. Nashville & Chattanooga Railroad Company*, 570.

See MESNE PROFITS.

SHAVING.

See CONTRACT.

SHERIFF.

See CONSTITUTIONAL LAW. DEEDS. EXECUTION.

SLANDER.

1. *Evidence.* Under the *general issue*, evidence to prove that the words spoken of the plaintiff are true, is inadmissible. This would only be admissible under the plea of justification, or under the *general issue*, with notice of such defence. *McCampbell v. Thornburgh*, 109.
2. *Same. Case in judgment.* The defendant was sued in slander, for charging the plaintiff with having committed *perjury*, in giving his evidence as a witness in a controversy about the establishment of one of two rival roads. He stated that one of said roads "could be made a good road with a little fixing." Held, that evidence that said statement was untrue, is not admissible under the *general issue*, without notice of the defence. *Ibid.*

See COSTS. EVIDENCE.

SLAVES.

1. *Rights of owner and hirer.* Between the owner and hirer of a slave, there is a personal trust and confidence reposed, and a contract implied by law, which forbids the hirer to transfer the possession or services of the slave to a third person without the owner's consent.
2. *Same. Trover. Case.* For a violation of this implied obligation, the owner may, in general, maintain either *trover* or *case* at his election. A simple violation of this implied contract, irrespective of the consequences, constitutes, of itself, a sufficient ground of action, and the owner may elect to treat it as a conversion, or sue in *case*.
3. *Same. Same. Same. Measure of damages.* In *trover*, for the conversion, the owner is entitled to recover the value of the slave. In an action on the *case* he is entitled to recover damages commensurate with the injury. If no injury accrues, and the slave is returned at the end of the year, the owner is entitled to some amount of damages for the mere violation of the implied contract not to sub-hire. In the event the negro dies while in the possession of the sub-hirer, the lowest measure of damages would be the value of the slave.
4. *Administration. Parties.* A sale of slaves made by an order of court, upon application, by petition, of the administratrix and her husband, to which the minor children, who were interested in said slaves, were not made parties, for the payment of debts due from the estate, or to reimburse them for advances made out of their own funds, for the benefit of the estate, is an absolute nullity. *Bennett et al. v. Kennerly et al.*, 674.
5. *Same. Extent of recovery. Damages.* The sale being a nullity, is a conversion of the slave; and the minor children may elect to take from the administrator the value of the slave at the time of the sale; or may pursue the slave in the hands of the purchaser and recover the possession, or the present value of the same. *Ibid*.
6. *Right to sue.* Slaves may sue by next friend, in all cases where their right to freedom is involved, or where the right of property connected with the grant of freedom is involved, although the enjoyment of freedom is postponed to a future day. *Stephenson and wife v. Harrison et al.*, 729.

See ADMINISTRATION. COMMON CARRIER. CRIMINAL LAW. EVIDENCE. FREEDOM. MASTER AND SERVANT. STATUTE OF LIMITATIONS. TAXATION. WILLS.

SPECIFIC ARTICLES.

See CONTRACT.

SPECIFIC PERFORMANCE.

1. *Rescission. Contract.* The specific performance, or rescission of contracts, is not a matter of absolute right in either party, but is a matter of sound discretion in the Court, to be exercised according to what, under all the circumstances of the case, may appear to be reasonable and proper. And, unless a proper case is made out for the interposition of the Court, either to enforce a specific execution, or to order the contract to be cancelled, the parties will be left to their remedies in the *legal forum*. *Humbard's heirs v. Humbard's heirs*, 100.
2. *Effect of refusal.* If the right to a specific performance is denied, the existence of the covenant or agreement, interposes no obstacle in a Court of law, to the investigation and determination of the rights of the parties. *Ibid.*

STATE.

When she may be sued. Statute of limitations. Actions may be instituted against the State under the same rules and regulations that govern actions between private individuals, except as to pleading the Statute of limitations.. *State v. Crutchfield's ex'rs*, 113.

STATUTES CITED AND CONSTRUED.

1809, ch. 121, § 3,	Revivor, - - - - -	568
1819, ch. 25, § 1,	Account, - - - - -	498
1815,	Administration, - - - - -	163
1836, ch. 48,	Attachment, - - - - -	392
1821,	Rents and profits, - - - - -	188
1849, ch. 51, § 2,	Clerk, - - - - -	698
1835, ch. 1, § 12,	Constables, - - - - -	609
1835, ch. 29, § 8,	Commissioners, - - - - -	583
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1809, ch. 84, § 1,	Deed, - - - - -	468
1852, ch. 152,	Ejectment, - - - - -	8
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1851-2, ch. 39,	Illegitimates, - - - - -	68
1799, ch. 8, § 4,	Gaming, - - - - -	233
1831, ch. 90, § 12,	Gift, - - - - -	440
1835, ch. 26,	Divorce, - - - - -	184
1715, ch. 28,	Deed, - - - - -	387
1851-2,	Judgment, - - - - -	373
1852, 1854,	Railroads, - - - - -	208
1831, ch. 90,	Registration, - - - - -	59
1852, ch. 259, § 2,	Set-off, - - - - -	570
1715, ch. 48,	Trust, - - - - -	366
1844, ch. 182,	Usury, - - - - -	547

STATUTE OF LIMITATIONS.

1. *Disability.* If the husband acquires land in right of his wife, and conveys the same by deed, and delivers the possession thereof—the wife not uniting in said conveyance—there being issue of the marriage at the date of the deed; and the husband survive the wife, the statute of limitations does not begin to run against the heirs of the wife, until the death of the husband. *Royston et al. v. Wear et al.*, 8.
2. *What will arrest the running of the statute. Disability of heirs.* The fact that the heirs are under disability at the death of the ancestor, will not arrest the running of the statute of limitations, if the adverse possession commenced in his lifetime. To prevent the operation of the statute, suit must be instituted, and effectually prosecuted, within the time prescribed by law. *Jones et al. v. Preston et al.*, 161.
3. *Same. Abatement of suit pending at the death of the ancestor. Forcible entry and detainer.* An action of forcible entry and detainer instituted within seven years, and pending the death of the ancestor, which is permitted to *abate* because it cannot be revived, or for other cause, will not affect the bar of the statute of limitations. To do this, the suit must be effectually prosecuted. *Ibid.*
4. *Husband and wife. Tenancy by the curtesy. Disability.* The principles settled in the cases of *Guion v. Anderson*, 8 Hum., 298; *Miller v. Miller*, Meigs, R., 484, and *Weisinger v. Murphy*, 2 Head, 674, are approved. *McLung et al. v. Sneed et al.*, 218.
5. *Resulting trust. Act of 1715, ch. 48, § 9. Case in judgment.* A resulting trust is barred by the act of 1715, ch. 48, § 9. If the purchase money to acquire title to land is paid by one person, but the title made to another, and the party in whom the legal title is vested dies, suit to establish a trust, if one exists, must be instituted within seven years after the death of such party, or the claim will be barred by the act of 1715. *Earles et al. v. Earles et al.*, 866.
6. *Effect of successive possessions.* The possessions of successive tenants under a landlord claiming title by entry only, may be connected so as to create the bar of the statute of limitations under the second section of the act of 1819. It is not necessary that a single tenant should have held possession for the whole term required by the statute. *Sims v. Eastland*, 868.
7. *Executor and Administrator. Act of 1789.* If proper and effectual steps are not taken within the time limited by the personal representative, to enforce satisfaction of a claim in his own favor upon the estate, the act of 1789 will form a bar, as in the case of other creditors, failing to sue within the proper time. *Byrn v. Fleming et al.*, 658.

8. *Possession. Presumption. Slaves.* If a distributee receive slaves from the administrator, as the joint property of himself and another distributee, the law presumes that he continued to hold them in the same right, and such possession would not be adverse. *Elliott and wife v. Holder, adm'r, et al.*, 698

9. *Same. Same. Evidence to remove presumption. Onus of proof.* To displace this presumption, the fact must be affirmatively proved, by clear and convincing evidence, not merely that he held the possession for himself, and adversely to his co-tenant, for the length of time required to give title by the statute; but, in addition, that his co-tenant had full knowledge of such adverse claim and holding during all that period of time. *Ibid.*

See BOND. CHANCERY PLEADING. CRIMINAL LAW. GAMING. LAND LAW. MESNE PROFITS. STATE. TRUST AND TRUSTEE.

STAY OF EXECUTION.

1. *Contract. Construction. Evidence.* If a debtor endorse on a note, "I confess judgment on the within note, and claim a stay of eight months," the legal implication is, that security is to be given; and it is not admissible to prove a verbal agreement that the debtor is to have the benefit of a stay of eight months without security, because it is contradictory of the writing. *Mayse v. Biggs and wife*, 36.

2. *Same. Husband not bound by the agreement of his wife.* If an agreement is made by the payor of a note, with the wife, to confess judgment upon the note, upon condition that he is to have the benefit of a stay of eight months without security, in the absence and without the knowledge of her husband, in whom is the legal interest; such agreement is void, and cannot be enforced against the husband. *Ibid.*

8. *Acknowledgment of liability.* The acknowledgment of a supposed legal liability, when none exists, does not bind the party making such acknowledgment. Hence, if a person's name is entered as stayor, under circumstances that will not, legally, bind him, a subsequent admission of his liability will not preclude him from contesting the legality of the stay. *Mayfield v. McLary*, 159.

4. *Justice of the peace. Where stay may be taken.* The office of a justice of the peace is the place where he performs the official act of rendering judgment; and if he accept a person as stay security at such place, although it may not be his ordinary place of transacting his official business, the liability of the stayor is fixed. *Morgan & Co. v. Coleman*, 352.

5. *When liable. Justice's office.* The place where an official act is done by a justice, is his office for that particular purpose, no matter

where it may be, so that it is within the territorial limits of his jurisdiction. Hence, if a justice render a judgment and receive a stay surety at a place different from his usual place of business, the stayor is bound. *Cheatham v. Brien*, 552.

6. *Entered after two days.* If a party go to the Magistrate's office and enter his name as stayor after the expiration of two days, in the absence of the Magistrate and Plaintiff the subsequent assent of the judgment creditor to the stay of execution, after the lapse of two days, and of the justice, to accept the party as stayor, manifested by their acquiescence, is as effectual to bind him as if their previous assent to the act had been expressly given. *Neil v. Beaumont, et al.*, 627.
7. *Same. Delivery Bond. Effect of forfeiture of.* If, in such case, the stayor execute a delivery bond and forfeits the same, the effect of the forfeiture is equivalent to a judgment against the stayor, after which he is estopped from gainsaying his original liability. *Ibid.*
8. *Effect of. Judgment.* The legal effect of the act of becoming stayor is equivalent to a confession of judgment: it has the force and effect of a judgment against the stayor; and if he acquiesce, and suffer the judgment to remain in force, he cannot, in a collateral proceeding in which it is sought to charge him with a legal liability resulting from his relation as stayor enquire into or impeach the validity of the proceeding or judgment, if it be not absolutely void on its face. *Holt v. Davis*, 629.
9. *Code, § 3065. Additional stayor. Affidavit. Notice.* By sec. 3065 of the Code, the plaintiff may at any time before the expiration of the stay, if he deems his debt in danger, on account of the condition of the stayor, require the defendant to justify or give other security; and if he fail to do so, have execution forthwith. But this requires an affidavit of the plaintiff, and two days' notice to the defendant *Gaw v. Rawley*, 716.
10. *Same. When affidavit essential.* The affidavit is required for the benefit of the defendant, to prevent him from being unnecessarily required to give other stay surety, or justify that already given. But, if he is notified and gives the additional security without requiring the affidavit, the stayor is bound. *Ibid.*

See PRINCIPAL AND SURETY.

SUITS.

1. *Dismissal of in vacation.* *Code, § 3199.* By the Code, § 3199, suits may be dismissed, in writing, out of term time, as well as in term. The dismissal, in vacation, puts an end to the suit, and terminates the

control of the Court over it, as fully as a dismissal in term time. *Thompson v. Thompson*, 527.

2. *Same. Power of the Court after dismissal.* By the dismissal in either mode, by the voluntary act of the parties, the power and jurisdiction of the Court over the parties and the cause, are at an end, except to render a judgment for costs, or to make such orders as may be indispensable, to give effect to the dismissal. *Ibid.*

See DIVORCE. PARTIES. RAILROAD COMPANIES. SLAVES.

SUMMARY PROCEEDING.

Motion. Constable. Execution, return of. An officer is not liable to a judgment by motion, for the non-return of an execution, if within the time given by law for its return his term of office expires. *Neil et al. v. Beaumont, Vanleer & Co.*, 556.

SURETIES.

See PRINCIPAL AND SURETY. ADMINISTRATION. CHANCERY JURISDICTION. COMMISSIONER. EXECUTION.

TAX SALES.

See DEED.

TAXATION.

1. *Legislative power. Corporation purpose—what. Constitutional law.* It is impracticable to lay down an exact general rule by which to determine what is a "corporation purpose." The question must, necessarily, be decided in view of the facts of each particular case. The judgment of the local government of a municipal corporation may, in general, be safely taken as *prima facie* evidence, as to whether the object proposed be a legitimate "corporation purpose." *McCallie v. The Mayor and Aldermen of Chattanooga*, 817.
2. *Same. Same. Same. Not necessary that the object be within the corporate limits.* It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. It is sufficient if it be a matter of vital importance to the permanent interests of the corporation, although situate beyond the limits thereof. The appropriation of the money may, even, be made to the construction of a part of a public work lying beyond the limits of the State. *Ibid.*
3. *Proposition submitted to a vote, when.* If the Legislature confers the power directly and exclusively upon the mayor and aldermen to sub-

subscribe stock &c., it is not necessary that the proposition to do so be submitted to a vote of the inhabitants of the town or city. *Ibid.*

4. *Privileges—how created. Livery stables.* The Legislature, alone, has the power to create privileges and forbid their exercise without a license. The Legislature has not made the keeping of livery stables a privilege, and until it is done by the law making power, that occupation cannot be taxed as such. *Mayor and Aldermen of Columbia v. Guest*, 418.
5. *Privileges. Tippling. County Court. Railroad Tax. Act of 1851-2, ch. 117, § 5.* The act of 1851-2, ch. 117, § 5, makes it the duty of the County Court, when stock is taken in a railroad company, to provide for its payment by levying a tax upon the taxable property, privileges, and persons, by law liable to taxation within the county; which tax shall be levied and paid upon the principle of levying the *State and county tax*. This provision was only intended to restrict the County Court, in levying this tax, to the principle that all property should be taxed according to value; but it does not limit the Court in taxing privileges, to the amount and mode of taxation for State and county purposes. This is left to the discretion of the Court. *Byrd v. Ralston*, 477.
6. *Constitutional law.* By the Constitution, Art. 2, sections 28, 29, all property shall be taxed according to *its value*. There are no other limitations or restrictions in the Constitution upon the power of the Legislature. *Brown v. Greer*, 696.
7. *Duty of assessors.* All property should be assessed at its fair value, to be determined by the ordinary selling and buying prices for cash, at the time the assessment takes effect. To place it any lower than this standard is a palpable dereliction of duty by the assessors, and an infringement upon their oath. *Ibid.*
8. *Where slaves to be assessed. Code, § 563.* Slaves are to be assessed to the owner in the county where he resides, whether in his possession or not; and whether in the *same county or not*. But the owner cannot be required to pay taxes on them in but *one county*. *Ibid.*

See CORPORATIONS. EVIDENCE.

TENANCY BY CURTESY.

See HUSBAND AND WIFE. STATUTE OF LIMITATIONS.

TENDER.

See SALE OF REAL ESTATE.

TITLE.

See CHAMPERTY. CHANCERY JURISDICTION. CONTRACT. DEED.
EJECTMENT. ESTOPPEL. EXECUTION. LAND LAW. MORTGAGE.
RAILROAD COMPANIES. REGISTRATION.

TRESSPASS.

See LAND LAW.

TROVER.

1. *General issue. Evidence.* In *trover*, all matters of defence may be given in evidence under the general issue of not guilty, except a release and the statute of limitations. A plea of justification is not necessary, therefore, on the part of an officer selling property under an execution. *Pemberton et al. v. Smith.*
2. *Same. Same. Fraud. Production of judgment and execution.* A fraudulent transfer of property is valid between the parties and can only be impeached by judgment creditors. It is, therefore, necessary, when an officer is sued for property thus held, to produce the judgment and execution, to show that the relation of debtor and creditor existed; and also to show his authority for seizing the property, before he can be heard to allege fraud in its transfer. *Ibid.*

See CONVERSION. SLAVES.

TRUST AND TRUSTEE.

1. *Implied trust. Land. Redemption. Widow.* If the land of an intestate is sold, and his widow redeems it within two years, with her own money, a trust will be implied in favor of the heirs; and, upon refunding the redemption money, or their just proportion of it, they would become entitled to the estate in *fee*, subject to the widow's right of dower. *Clark v. Cantwell, et al., 202.*
2. *Same. Same. Same. Lien. Husband and wife.* The widow would have a lien on the land redeemed, for the re-imbursement of the redemption money; and, on failure of the heirs to pay, she may subject their interest in the land to its satisfaction. This being so, upon the subsequent marriage of the widow, the lien would inure to the husband, as a chose in action of the wife; and, *a fortiori*, would the lien so inure in case the payment of the redemption money should fall upon the husband, after the marriage. *Ibid.*
3. *Same. When the land is redeemed after the two years. Where the redemption is effected by the widow, by the voluntary agreement of the parties in interest, after the expiration of the time limited by the*

statute—but with the intention that the effect should be the same as if the redemption had been regularly made in proper time—the rights of the respective parties would be the same, as if the redemption had been made within the two years, *Ibid.*

4. *Same. Same. Extent of the lien.* The extent of the lien in such case would be for the redemption money and incidental charges. The redemption would be regarded in law, as a *purchase* for the exclusive benefit of the widow and heirs; and the land would not be subject, in their hands, to the pre-existing debts of the estate of the intestate. *Ibid.*
5. *Same. Same. Same. Advances made to the heirs.* As the creditors of the intestate could not, *directly*, subject the land to the payment of their debts, the widow, or her second husband, could not, as against the heirs, *indirectly*, charge it, by reason of having paid the debts of the estate; nor can advances in money, voluntarily made by the widow, or by her said husband, to the heirs, create a lien upon the land. *Ibid.*
6. *Same. Same. Same. Creditor. Attachment.* Such advances would constitute a mere personal liability on the part of the heirs; and the widow, or husband, as a creditor, would be entitled to satisfaction out of the fund arising from the sale of said land, if sold by the heirs, in the hands of the purchaser, and attached by him or her. *Ibid.*
7. *If land is purchased and not redeemed by the widow. Descent.* If the land of the intestate had been sold, and the purchaser had acquired a good and indefensible title—the time allowed by the statute to redeem having expired—and the widow purchases the land unconditionally, she acquires an estate in *fee simple*; and no implied trust is raised in favor of the heirs. In such case, the land is absolutely hers, and, at her death, descends to her heirs at law. *Ibid.*
8. *Liability of trustee for negligence. Will. Statute of limitations. Interest.* The will of the testator contained the following clause: "The debt due me from William Lowry and my son, Alexander, and for which I have their note, I hereby assign and transfer to my son, John McGee, to be held by him *in trust*, to permit the said William Lowry and Alexander McGee to use and employ said sum of money in whatever manner may be profitable to them, the said William and Alexander. But in case any accident or calamity is likely to befall them, then it is my will and desire that my son John, as trustee for that purpose, should receive said sum of money, and apply it in such manner as in his judgment should be most useful and beneficial to Polly Lowry, wife of said William, and her children, and to said Alexander and his children. John McGee qualified as executor. *Held:*

1. By qualifying as executor, John McGee assumed the trust imposed upon him by the will, and he was bound to act faithfully and with vigilance for the interest of the beneficiaries.
2. Upon the happening of the contingency contemplated by the will, it was the duty of the trustee to use all proper and necessary means to secure and collect the fund, to be held and used by him for the purposes and trusts specified; and upon failure to do so, he was personally liable for the fund, with interest thereon.
3. Until the happening of the contingency provided for, Lowry and Alexander McGee had the right to use and employ the fund as they deemed proper, and the same could not, until then, have been collected by the trustee. And until he had a right to collect the fund, he is not chargeable with interest.
4. Lowry failed in 1843, and no effort was made by the trustee to collect or secure the note, although the trustee was apprized of his failing condition; and the complainant is entitled to recover the one-half of the note, \$5,000, with interest from that date.
5. Even if the debt had been barred by the statute of limitations, the trustee is not relieved from liability, thereby, because no steps had been taken by him, by renewals, or otherwise, to guard against that defence; and because the debtor might not have seen fit to rely upon the statute, even if, by law, he could have done so. *Lowry v. McGee et al.*, 269.
9. *When implied.* If a son, under the injunction of his father to purchase a farm for his sister, buys a tract of land and places her upon it, taking the legal title to himself, there being no consideration passing from or for her to the son—it constitutes a voluntary unexecuted trust, binding only in *foro conscientie* of the son and his heirs, and cannot be enforced in favor of the sister. *Ibid.*
10. *Will. Consideration.* If, upon the execution of a will, a person who takes no benefit under it, promises the testator to give one of his children as much property as he, the testator, will be able to give his other children; and, thereby, induces him not to give such child any part of his estate, the promise is without consideration, and no trust is created in favor of the child, that can be enforced against the party making the promise. *Robinson v. Denson, ex'r*, 895.
11. *Fraud. Question reserved.* What would be the effect of a fraudulent promise of this description, by which an injury or loss resulted to the party for whose benefit the promise was made. *Ibid.*

See DEED. TRUST AND TRUSTEE. FREEDOM. JURISDICTION. REGISTRATION. STATUTE OF LIMITATIONS. WILLS.

USURY.

1. *When creditor may recover it. Judgment. Act of 1844, cA. 182.*

Under the act of 1841, ch. 182, a creditor or surety, before he can sue, either at law or in equity, to recover usury paid by his debtor or principal, must establish his demand by judgment or decree. The party paying the usury, or his personal representative, may sue as owner. *Battle v. Shute et al.*, 547.

2. *Discounting notes.* The regular business of discounting notes by deducting from their face the interest for the entire time they have to run, though in itself usurious—as the borrower pays interest on the amount thus deducted—has been long sanctioned by the courts, rather from necessity than upon principle. *Wetmore v. Brien & Bradley*, 723.
3. *Shaving.* A note made in the course of a real business transaction, for which the original party has given a valuable consideration, is regarded as property; and, like other property, the owner may sell it for the most he can get, and whatever profit the purchaser may make on his purchase, there is nothing *usurious* in it. *Ibid.*
4. *Same. Note made to raise money.* But if the note were made for the purpose of being sold to raise money; or as an artifice to evade the usury laws, under the color of a sale and purchase of the paper, this will not avail, and the purchaser, under such circumstances, with knowledge of the facts, either actual, or inferable from the facts of the case, will be held guilty of usury, if the discount shall have been greater than the legal rate of interest. *Ibid.*

See CONTRACTS. CRIMINAL LAW. EVIDENCE.

VENDOR.

See LIEN. WAIVER.

VENUE.

See CRIMINAL LAW. JURISDICTION.

WAIVER.

Vendor's lien. If a vendor who holds a lien upon land for the payment of the purchase money, by affirmative acts and declarations, induces the belief, on the part of a subsequent purchaser, prior to his purchase, that he renounces or abandons his lien, it is a waiver thereof, and the vendor cannot, thereafter, enforce it, to the prejudice of such purchaser. *Thompson v. Dawson et al.*, 384.

See BILLS AND NOTES. EXECUTION.

WARRANTY.

Implied. Limited by the covenant of the parties. When there is an express covenant between parties, more limited in its nature than the covenant the law would imply, the implied covenant will be limited by the agreement thus entered into, and the parties will be bound thereby. *Rhea v. White et al.*, 121.

See LAND LAW.

WATERCOURSE.

Nuisance. Mill-dam. Spring. Actual possession, by enclosure not necessary to sustain suit for damages. For an injury, by overflow, to the spring and ford of another, it is not necessary, in order to a recovery by the plaintiff, to show a title to the land, or possession by enclosure. An actual possession by the plaintiff, for the ordinary purposes of use by his family and hands, is all that is necessary. *Allen v. McKorkle*, 181.

See LAND LAW.

WIDOW.

1. *Will. Dower.* If the widow of a testator does not dissent from the will of her husband, she is bound by its provisions, and can take no part of his estate, as to which he died intestate. She is not entitled to be endowed of lands not disposed of by his will. *McClung et al. v. Sneed et al.*, 218.
2. *What the widow takes when she dissents from the will. Code, § 2409.* By the Code, § 2409, where a satisfactory provision, in real and personal estate, is not made for the widow, by the will of her deceased husband, she may, within one year after the probate of the will, dissent therefrom; and be endowed as if her husband had died intestate. The use of the term *endowed* does not limit the estate to be taken by the widow to one-third of the land, but embraces the personal estate, and the widow is entitled to such portion of her husband's property as she would have been, had he died intestate. *Gupton v. Gupton et al.*, 488.

WILLS.

1. *Evidence. Interest of witness.* It is a well settled rule of evidence, that a witness is competent who is called to testify against his interest, or where he is equally interested on both sides of the cause, so that his interest on one side, is counterbalanced by his interest on the other. This rule of evidence obtains in contests about wills, as in other civil suits. *Walker, Ex'r, v. Skene, et al.*, 1.

2. *Same. Doubt as to interest.* The question of competency is, in all cases, a collateral one; and it is not proper to reject the witness, altogether, because of the difficulty of ascertaining his interest. A witness is presumed to be competent, and the *onus* of shewing his incompetency is upon the objecting party. If he fails to establish his incompetency, or his interest is left in doubt, it is proper to permit the witness to be examined and let it go to his credit. *Ibid.*
3. *Same. Question may be submitted to the jury.* The question as to the competency of a witness is, usually, to be determined by the Court; but, as it often depends upon the decision of intricate questions of fact, the Court may, in its discretion, take the opinion of the jury upon the facts. *Ibid.*
4. *Same. Act of 1784. Witness not to be interested in the devise of the lands.* By the act of 1784, a witness to a will of real estate is competent to prove the due execution of said will, provided he is not interested in the devise of such lands, although such witness may be a legatee as to the personality. *Ibid.*
5. *Same. Same. Witness must be competent when the will is attested.* Under the act of 1784, the witnesses to a will must be competent at the time of their attestation of such will; and if the will be once properly attested, no subsequent event can destroy its validity. *Ibid.*
6. *Same. Same. Construction of.* The language used in the will, "provided, they, the said John Walker and James E. Walker support their sister, Elizabeth Walker, so long as she remains single," in reference to the land there given them by the testator, creates in her no estate, or interest. Her support is, simply, a *personal charge* on said devisees. There is no charge upon the estate, and the competency of said witness is not affected by said provision. *Ibid.*
7. *Question reserved.* If an attesting witness takes an interest in the devise of lands under the will, which is neutralised or overbalanced by a contrary interest of equal, or greater value in the estate, in case of an intestacy, or from other cause, is he competent under the act of 1784 to prove the will? *Ibid.*
8. *Construction. Issue of female slaves.* No right to slaves bequeathed in a will vests in the legatees until the death of the testator; and the children of such slaves, born after the execution of the will, but before the testator's death, do not pass under the will to the legatees owning their mothers, but remain the property of the estate. *Perry, Adm'r, v. High et al., 349.*
9. *Same. Same. Residuary clause.* If, after the general words, "all the remainder of property," in the residuary clause of a will, there is

an enumeration of the property given, this enumeration qualifies the force of the general words, and restricts the residuary clause to the things specified. *Ibid.*

10. *Construction.* The testator gave to the children of his son certain lands and slaves. Said property and its increase, or the proceeds of the slaves and farm, were not to be subject to the debts of the son, but to go wholly to the support of said children and their mother. At the death of said son and his wife, said land and slaves and increase were to be equally divided between said children. Trustees were appointed to take charge of and manage the property, with power to sell and re-invest. The testator gave his son \$500 and a bed as his full share of his estate. The testator, by a codicil to his will, revoked all of said provisions of his will, except the slaves, mentioning Peter in the codicil, who was not mentioned in the will; and also gave \$8000 in lieu of the tract of land. Two of the slaves mentioned in the codicil were levied on by the creditors of the son. Held:

1. That the land and slaves mentioned in the will were given to the children of the son, subject to the use of the father and mother for life; but the same is not subject to the debts of the son.

2. That the interest of the son is not enlarged by the codicil. The dispositions and provisions of a will are not to be regarded as changed or disturbed by a codicil, any further than is absolutely necessary to give proper effect to the latter.

3. The only effect of the codicil is to substitute the slaves enumerated for those bequeathed in the will, and the sum of \$8000 for the land. It does not change the character of the title, nor the trusts attached to the property. *Brown v. Cannon et al.*, 354.

11. *Construction. Remoteness.* A gift, by will, to A., upon the death of the testator's daughter "*without issue*," is void for remoteness. *Hamner et al. v. Hamner, Ex'r*, 398.

12. *Construction of.* In the second clause of his will, the testator gave his wife \$1,000 in money and a negro boy, absolutely; and, also, during her natural life or *widowhood*, all the remainder of his property, both real and personal. The testator, also provided that his wife should not be required to give bond and security for the forthcoming of said property *at her death*, but that she should have the free use and control of all said property during her *natural life* or *widowhood*. In the fourth clause he provided that at his *wife's death*, the property should be equally divided between his brothers and sisters, and their heirs, &c. Held, that, by the proper construction of the will, the wife did not take a life estate, in the event she married—that her interest in the property, except the money and negro boy, terminated upon her marriage. *Duncan et al. v. Philips et al.*, 415.

13. *Construction of. Descent.* The testator bequeathed his estate to his wife for life, but if she married, she was to give up all the property, to be equally divided between her and his children. She had two children by the testator, and one by a previous marriage. She married in 1850, and died in 1851; one of the testator's children died in 1857. Held:

1. That, by the proper construction of the will the widow was entitled to an estate for life in all the property, in the event she remained single, but if she married, she was entitled to one-third, in fee.

2. Upon her death, her interest in the real estate was cast by descent, equally, upon her three children.

3. Upon the death of the child, his interest in the real estate derived from his father, descended to the child of the whole blood, and his interest derived from his mother, descended to the two children equally. *Lane v. Crutchfield et al.*, 452.

14. *Construction. When persons take as a class.* If the bequest in a will, of a remainder, is as explicit as to the persons who are to take, as if they were named, the remainder vests, as it would have done if the parties had been named, and they do not take as a class. *Alexander et al v. Walch*, 498.

15. *Same. Case in judgment.* The will contains the following clause: "I give to my sister, Nancy, all my landed estate and negro man, named Abe, and a negro boy, named Stephen, during her natural life, then to be sold and equally divided amongst my sisters and brother. Held, that the remainder vested, and the sisters and brother did not take as a class. *Ibid.*

16. *Construction of. Power coupled with a trust. Advancements.* After devising all his personal and real estate to his wife, the testator used this language: "Believing that she will make an equitable distribution of the property, at her death, among our children. * * * She is getting old and infirm, and when I am gone this power to give will make them, I hope, dutiful and affectionate to her, as I hereby give her the power to reward those that are most dutiful to her."

Afterwards a plantation and mills, which the testator thought would return to his estate, were devised to one of his sons. Held:

1. That the paper last executed must be read in connection with, and as part of the will, and that its effect is to give the plantation, mills, etc., to the testator's son, as an advancement, leaving the will, in all other respects, intact.

2. That under the will the widow took a life estate in the property, with a power of appointment coupled with a trust; the will not con-

ferring a mere naked power, which the party might or might not execute in her discretion.

3. That the widow may make a just and reasonable discrimination in the division of the property, based upon the good or ill conduct of the children towards her after testator's death; but there must be a real and substantial allotment to each one in the distribution.

4. The power of appointment being coupled with a valid trust, and the widow having died without executing the power, a court of equity will hold the trust to survive, and will decree its execution; it would be otherwise if it was a mere naked power, not coupled with a trust.

5. In decreeing the execution of the trust, the court will, as far as practicable, carry out the wishes and intentions of the testator, apparent from the face of the will, if there is nothing inequitable or improper in itself, in its provisions.

6. The inquiry as to whether the children were alike dutiful to their mother, she having died, is impracticable; the facts are not capable of ascertainment, in any satisfactory mode. All that the court can do is to give effect to the general intention of the donor.

7. In order that words of recommendation, entreaty or wish, shall be held to create a trust, it is necessary; first, that the words are so used that upon the whole they ought to be construed as imperative; secondly, the subject of the recommendation or wish be certain; and thirdly, that the objects or persons intended to have the benefit of the recommendation or wish, be also certain. *Anderson et al. v. McCullough et al.*, 614.

17. *Who may contest.* If a will has been proved in a court having jurisdiction of the probate of wills, none but persons having an interest in the estate of the testator, as heirs or distributees, can contest the validity of the same either in a direct or collateral proceeding. *Bank of Tenn. v. Nelson et al.*, 684.

18. *Same. Case in judgment.* Nelson made his will devising his real and personal estate to his wife for life, with remainder to his children. The devisees were witnesses to the will. A creditor of one of the devisees filed a bill and attached his interest in the estate, and sought to set aside the will upon the ground that it was inoperative to pass the real estate, because of the incompetency of the witnesses. Held: that the creditor can only recover in right of his debtor who is content with the will; and, having no interest in the estate as heir or distributee, cannot contest the will. *Ibid.*

19. *Probate in common form.* When set aside by the County Court. When a will has been proven in common form before the County Court, it can, alone, be annulled by the judgment of the Circuit Court, founded

upon the verdict of a jury against the validity of the will. *Byrn v. Fleming et al.*, 658.

20. *Same. Will sustained. Qualification of executor.* If a will has been proven in common form before the County Court, and the executor duly qualified; but afterwards the same is certified to the Circuit Court and an issue formed testing the validity of said will, as to the real estate, leaving it unaffected as to the personalty, the office of executor, which had been regularly conferred on him, with all its rights, duties and consequences, continued to exist in full force, as if no contest upon the will had taken place. *Ibid.*

21. *Construction of. Limitation over. Trustees.* The testator, after other bequests, gave the residue of his estate, real and personal, to his children, Catharine D. J. and Benjamin Russ DeGraffenreid, and directed that if his said son should die without issue, before attaining the age of twenty-one years, that the estate given him, should go to his said daughter, her heirs and representatives. He directed that such part of his personal estate as is given to his daughter, if the same shall not exceed one-half in value of the whole real and personal estate given her, should be converted into money by his executors, and the same be paid over to trustees, appointed by a court of chancery, to be by them held in trust, &c. He proceeds to direct the trustees to appropriate the interest upon the fund to the sole and separate use of the said Catharine, &c., and directs that, at her death, the trustees shall "pay, transfer and assign the same to the next of kin of the said Catharine D. J., their heirs, executors, administrators and assigns, according to the statute for the distribution of the effects of persons dying intestate." Held :

1. That the limitation over to Catharine, in the event contemplated by the will, is valid. Consequently, on the death of Benjamin, under the age of twenty-one years, without leaving issue, his entire estate, derived under the will, passed to his sister, Catharine; but the surplus of the income of said fund did not pass to her.

2. That the provision of the will that one half in value of the whole real and personal estate, given by the will to Catharine should be converted into money, and vested in a trustee for her benefit, under the trusts therein declared, applies as well to the contingent, as to the direct, absolute gift. *Ewin and wife v. Park et al.*, 718.

22. *Construction of. Slaves.* The deceased made his will in 1845, in which is the following clause: "I give and bequeath to my wife, Susannah Winston, all my property, both real and personal, during her life, including any money on hand, or notes or accounts due me, to dispose of as she may need for the use of the family, except my tract of land near Spring Hill, and my house and lot in Spring Hill, and

my lots in Franklin." The land and lots excepted, are directed to be sold, and the proceeds when collected to be "deposited in the Planters' Bank at Franklin, and also the amount of money and debts due me, reserving to my wife, any of the last mentioned money that she may need for the use and benefit of my negroes, during her life, and at her death, it is my will, that all my slaves be set free." He requests the County Court to appoint some suitable person to make arrangements for the transportation of the slaves to Liberia, to be paid out of the proceeds of the land and lots. The remainder of that fund is to be applied as far as may be necessary, to pay the expenses of the slaves to Liberia; and what is left, to be equally divided among them. The codicil contains this clause: "I will and direct that all my money, which shall be deposited in the Bank by my executors, as in my will is directed, shall be applied, used and appropriated, by my executors, to the same object and to the same uses and purposes, as the money arising from my Spring Hill tract of land, is willed and directed to be used in my will, of March 24th, 1845." Should the County Court fail to make the appointment requested, the executors are charged with the duty of carrying out his purpose, in regard to his slaves; and the testator further directs that "the money so deposited in the Bank from the sale of my land and lots, together with any remaining money of my estate that is not otherwise disposed of, after all expenses are paid, to be divided equally with my negroes that go to Liberia." Held:

1. That the wife has no right to any profits made upon the funds given to the slaves before their emancipation; but the same go to the slaves. The fund is not to be used, but if used and profits accrue, they belong to the slaves.

2. That the codicil places the other funds directed to be deposited in Bank, precisely upon the same ground as that derived from the Spring Hill property, and are to enure to the benefit of the slaves at the death of their mistress, except so far as may be necessary for the support of the family, including the slaves, after applying the proceeds of their labor and the rents of lands. *Stevenson and wife v. Harrison et al.*, 729.

23. *Construction of. Creditors.* The testator directed that his property be kept together by his executors, and managed by them until his youngest child should arrive at the age of twenty-one years. They were clothed with full power to sell any of the property and purchase other property; or exchange property, having the same power as the testator, to manage the estate for the benefit of his children.—He directed, when his youngest child arrived at the age of twenty one years, that the property be equally divided between his children and the descendants of such as died. Held:

1. That the interests of the respective devisees and legatees were not to be severed from the mass of the estate, or to be enjoyed in pos-

session until the youngest child arrived at the age of twenty-one years.

2. That the entire estate is placed in the exclusive possession, and under the control of the executors, with an unlimited power to manage it, until the youngest child shall attain his full age; and then it is to be equally divided between the surviving children, and the descendants of children who may have died, leaving children surviving them.

3. That, as neither of the children, have a right to demand that he shall be let into the possession of his share of the estate, until the youngest child arrives at age, a creditor of either child, seeking to subject his share to the satisfaction of his debt, can stand on no higher or different ground; and cannot obtain possession of a share sold until the happening of that event. *Perkins and wife v. Clack et al.*, 785.

See CHANCERY JURISDICTION. FREEDOM. MESNE PROFITS. SALE OF REAL ESTATE. TRUST AND TRUSTEE. WIDOW.

WITNESS.

1. *Evidence. When a party to the record competent. Code, § 3810.*
Prior to the adoption of the Code, a party to the record, although not interested, was an incompetent witness. This general principle is so far changed by section 3810 of the Code, as to render a person a competent witness, although his name is used as a party on the record, if he has no legal interest in the subject matter of the suit. But if he is interested in the subject matter, he is incompetent, not only upon general principles, but under the provisions of the Code. *Barton v. Cope*, 167.
2. *Same. Same. Bills and notes. Transfer by delivery. Liability of payee.* If the payee of a note transfer the same by delivery, without indorsement, there is an implied warranty that the note is not forged or fictitious; and if its genuineness is put in issue by the plea of *non est factum*, the payee and his wife are incompetent witnesses. In the absence of fraud or a special undertaking, the payee is not liable, if the maker of the note prove to be insolvent. *Ibid.*
3. *When interest disqualifies. Evidence.* If a witness has no more private or personal interest in the subject matter of the suit, than any other inhabitant or citizen of the county, he is competent. In such case his interest is too remote, contingent and minute to disqualify him. *Esell v. the Justices of Giles County*, 583.
4. *Party to the record. Justices of the County. Corporation.* A suit by the Justices of the County Court is, in legal effect, a suit by the

county, which is a public corporation; and it is this corporation that is the party to the record. The Justices have no private interest in the suit, and their names may be rejected as surplusage; and any one of the Justices is, in such case, a competent witness. *Ibid.*

See CRIMINAL LAW. EVIDENCE. JURORS. PRACTICE AND PLEADING. WILL.

WRIT OF ERROR.

1. *Motion to dismiss. Section 8188 of the Code. Construction of.* A writ of error is regarded in law as a new suit, and like all other suits, may be commenced by the party at his own peril without notice to the adverse party. Hence, it is not necessary to give the five days' notice required by section 8188 of the Code before applying for the writ. But, as in all other suits, the opposite party must have a day in Court to make his defence; and he must have notice of the pendency of the suit in the Supreme Court, at least five days before it is heard. *Spurgin v. Spurgin, 23.*
2. *Mode of obtaining the writ.* There are several modes of obtaining a writ of error: By simply filing a transcript of the record with the Clerk of the Supreme Court and giving bond; or by application to the Court in term time; or to one of the Judges in vacation. *Ibid.*
3. *Time within which it must be applied for.* A writ of error must be obtained from the Clerk within one year after the judgment or decree, sought to be reversed, is rendered. *Ibid.*

See APPEAL.

E. J. M.

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